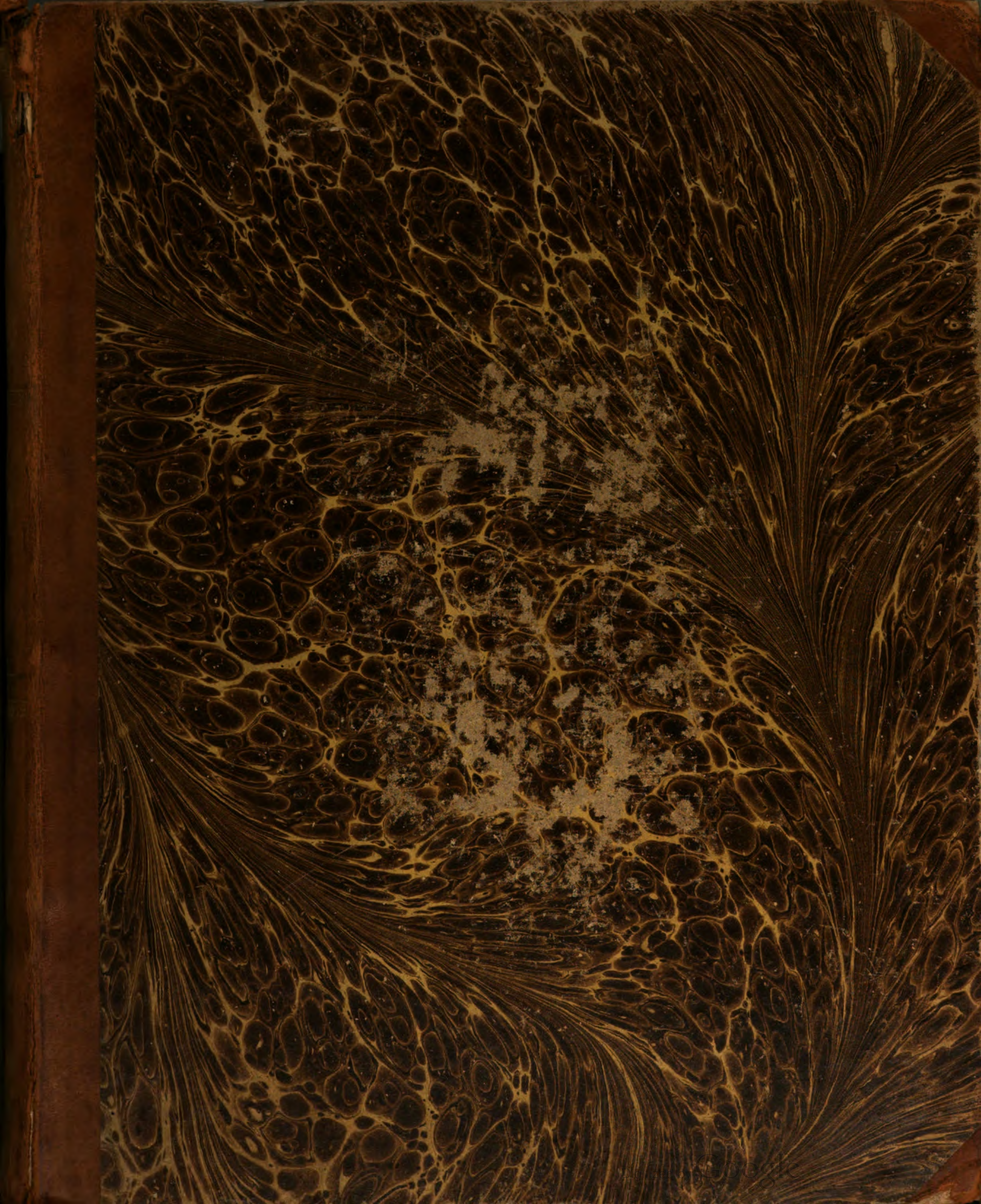
This is a reproduction of a library book that was digitized by Google as part of an ongoing effort to preserve the information in books and make it universally accessible.

Google™ books

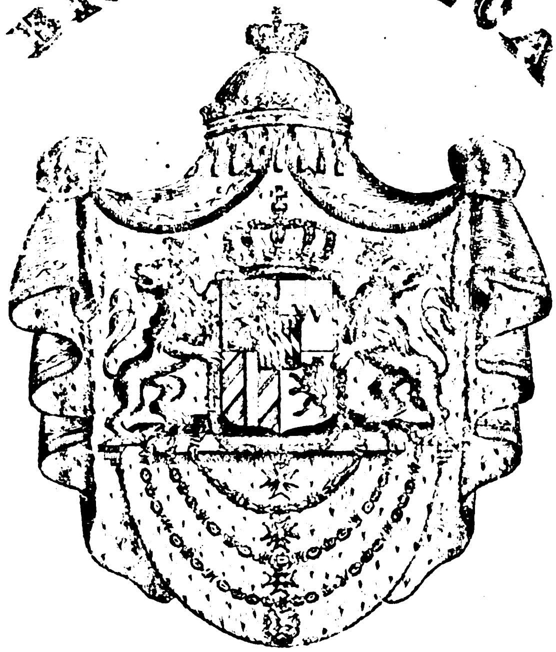
https://books.google.com



4° 841

Hidayah.

BIBLIOTHECA



REGIA
MONACHENSIS.

Digitized by Google

Digitized by Google

٣٥٢

Digitized by Google

THE

HEDÀYA, OR GUIDE;

A

COMMENTARY

ON THE

MUSSULMAN LAWS:

TRANSLATED BY ORDER OF THE

GOVERNOR-GENERAL AND COUNCIL

OF

BENGAL,

BY

CHARLES HAMILTON.

VOL. III.

LONDON:
PRINTED BY T. BENSLEY.
M.DCC.XCI.

Digitized by Google

BIBLIOTHECA
REGIA
MONACENSIS

Digitized by Google

CONTENTS

OF THE

THIRD VOLUME.

BOOK XXIII.

Of *Agency*.

Chap. I. Introductory, - - - - Page 1

Chap. II. Of Agency for *Purchaſe* and *Sale*.

  Sect. I. Of Agency for *Purchaſe*, - - 9

  Sect. II. Of the Appointment of Agents by Slaves, for the Purpoſe of purchaſing their Perſons, in their own Behalf, - - 27

  Sect. III. Of Agency for *Sale*, - - 29

  Sect. IV. Miſcellaneous Caſes, - - 39

Chap. III. Of Agents for *Litigation* and for *Seizin*, - 44

Chap. IV. Of the *Diſmiſſion* of *Agents*, - - 56

A 2 BOOK

BOOK XXIV.

Of *Dawee*, or *Claims*.

Chap. I. Introductory, - - - - - Page 63
Chap. II. Of *Oaths*, - - - - 68
Section. Of the Manner of Swearing, and requiring an Oath, - - - 77
Chap. III. Of *Tahâlif*; or the Swearing of both the Plaintiff and the Defendant, - - 83
Section. Of Perſons who are not liable to Claims, 101
Chap. IV. Of Things claimed by two Plaintiffs, - - 105
Section. Of Diſputes concerning Poſſeſſion, - 122
Chap. V. Of Claim of Parentage, - - 124

BOOK XXV.

Of *Ikrâr*, or *Acknowledgments*.

Chap. I. Introductory, - - - - - 138
Section. (Concerning Acknowledgments with reſpect to *Embryos*,) - - 142
Chap. II. Of *Exceptions*; and what is deemed equivalent to *Exception*, - - - 144
Chap. III. Of Acknowledgments made by *ſick* Perſons, - 161
Section. Miſcellaneous Caſes, - - 168

BOOK XXVI.

Of *Soolh*, or *Compoſitions*.

Chap. I. Introductory, - - - - - - - 175

Section.

Section. (Miſcellaneous,) - - Page 181

Chap. II. Of *gratuitous* or *voluntary* Compoſitions; and of *Agents* for Compoſition, - - 190

Chap. III. Of Compoſitions for *Debt*, - - 194

Section. Of participated Debts, - - 199

Section. Of *Takhârij*, - - 206

BOOK XXVII.

Of *Mozaribat*, or Copartnerſhip in the Profits of Stock and Labour.

Chap. I. Introductory, - - - - 212

Chap. II. Of a Manager entering into a Contract of *Mozâribat* with another, - - - 228

Section. (Miſcellaneous,) - - 234

Chap. III. Of the Diſmiſſion of a Manager; and of the Diviſion of the Property, - - 236

Chap. IV. Of ſuch Acts as may be lawfully performed by a Manager, - - - 241

Section. (Miſcellaneous,) - - 250

Chap. V. Of Diſputes between the Proprietor of the Stock and the Manager, - - - 255

BOOK XXVIII.

Of *Widda*, or *Depoſits*, - 259

BOOK XXIX.

Of *Areeat*, or *Loans*, - 277

Digitized by Google

BOOK XXX.

Of *Hibba*, or *Gifts*, - Page 290
Chap. I. Introductory, - - - - - 291
Chap. II. Of Retractation of Gifts, - - - - 300
Section. (Miſcellaneous,) - - 307
Section. Of *Sàdka*, or *Alms-deed*, - - 310

BOOK XXXI.

Of *Ijàrá*, or Hire, - 312
Chap. I. Introductory, - - - - 313
Chap. II. Of the Time when the Hire may be claimed, - 316
Section. (Miſcellaneous,) - - 322
Chap. III. Of Things the Hire of which is unlawful, or otherwiſe; and of *diſputed* Hire, - - 324
Chap. IV. Of *invalid* Hire, - - - - 334
Chap. V. Of the Reſponſibility of a Hireling, - 350
Chap. VI. Of Hire on one of two Conditions, - 355
Chap. VII. Of the Hire of Slaves, - - - 360
Chap. VIII. Of Diſputes between the *Hirer* and the *Hireling*, 364
Chap. IX. Of the Diſſolution of Contracts of Hire, - 366
Section. Miſcellaneous Caſes, - - 373

BOOK XXXII.

Of *Mokatibs*, - 376
Chap. I. Introductory, - - - 377

Chap.

Chap. II. Of invalid *Kitâbat*, - - - Page 382
Chap. III. Of Acts unlawful to a *Mokâtib*, or otherwiſe, - 391
Section. (Miſcellaneous,) - - 397
Section. (Miſcellaneous,) - - 402
Chap. IV. Of a Perſon tranſacting a *Kitâbat* on behalf of a *Slave*, 411
Chap. V. Of the *Kitâbat* of *Partnerſhip* Slaves, - 414
Chap. VI. Of the *Death* or *Inſolvency* of the *Mokâtib*; and of the Death of his Maſter, - - 424

BOOK XXXIII.

Of *Willa*, - 436
Section. Of *Willa Mawalât*, or the *Willa* of *Mutual Amity*, 448

BOOK XXXIV.

Of *Ikrah*, or *Compulſion*, - 452
Section. (Miſcellaneous,) - - 459

BOOK XXXV.

Of *Hijr*, or *Inhibition*, - 468
Chap. I. Introductory, - - - 469
Chap. II. Of Inhibition from weakneſs of Mind, - 473
Section. Of the Time of attaining Puberty, - 482
Chap. III. Of Inhibition on account of *Debt*, - - 484

BOOK XXXVI.

Of *Mazoons*, or *Licenced Slaves*, - 493
Section. (Concerning a Licence to *Infants*,) - - 518

Digitized by Google

BOOK XXXVII.

Of *Ghazb*, or *Uſurpation*, - Page 522

Section. Of uſurped Articles, altered by Acts of the Uſurper, 532

Section. (Miſcellaneous,) - - - - 542

Section. Of the Uſurpation of Things which are of no Value, 551

BOOK XXXVIII.

Of *Shaffa*, - - 561

Chap. I. Of Perſons to whom the Right of *Shaffa* appertains, 562

Chap. II. Of *Claims* to *Shaffa*; and of Litigation concerning it, 569

Section. Of diſputes relative to the Price, - 577

Section. Of the Articles in lieu of which the *Shafee* may take the *Shaffa* property, - 581

Section. (Miſcellaneous,) - - 586

Chap. III. Of the Articles concerning which *Shaffa* operates, 591

Chap. IV. Of Circumſtances which invalidate the right of *Shaffa*, 599

Section. (Miſcellaneous,) - - 604

Section. Miſcellaneous Caſes, - - 607

TRANS-

Digitized by Google

TRANSLATION

OF THE

HEDÂY̆A.

A

COMMENTARY

ON THE

MUSSULMAN LAWS.

BOOK XXIII.

Of AGENCY.

Chap. I. Introductory.
Chap. II. Of Agency for *Purchaſe* and *Sale.*
Chap. III. Of the appointment of Agents for *Litigation,* and for *Seizin.*
Chap. IV. Of the diſmiſſion of Agents.

BAYERISCHE STAATS- BIBLIOTHEK MÜNCHEN

CHAP. I.

IT is lawful for a perſon to appoint another his agent, for the ſettlement in his behalf of every contract which he might have lawfully concluded himſelf, ſuch as *ſale*, *marriage*, and ſo forth; be-

A perſon may lawfully appoint another his *Agent*, to act on his be-

Digitized by Google

BAYERISCHE STAATS-BIBLIOTHEK MUENCHEN

half in *contracts*;

cauſe, as an individual is ſometimes prevented from acting in his own perſon, in conſequence of accidental circumſtances, (ſuch as ſickneſs, or the like,) he is therefore admitted, of neceſſity, to appoint another his agent, in order that that perſon may expedite his wants by means of the powers which he derives from ſuch appointment. It is, moreover, related in the *Nakl Saheeh*, that the prophet appointed *Hakeem-Bin-Khirâm* his *agent for purchaſe*, in order that he might buy for him a camel to ſacrifice;—and likewiſe, that he appointed *Amir-Bin-Aum* his *agent for marriage*, that he might conclude a marriage betwixt his mother and the prophet.

and for the management of *ſuits*, or *criminal proſecutions*; or for the payment or exaction of all rights except *retaliation* or *puniſhment*.

It is lawful for a perſon to appoint another his agent for the management of a ſuit relative to any rights whatever, (even to corporal puniſhment or retaliation,) for the reaſons already alleged; and alſo, becauſe every perſon is not himſelf capable of managing a buſineſs of this nature.—It is moreover recorded, in the *Nakl Saheeh*, that *Alee* appointed *Akeel* his agent for the management of his ſuits, and that when *Akeel* became old he diſmiſſed him, and appointed *Abdoola-Bin-Jáfir*.—In the ſame manner, alſo, it is lawful to appoint an agent for the payment of rights, or the exaction of them: excepting, however, in caſes of *puniſhment* or *retaliation*, the appointment of an agent in which (as if an agent were appointed to exact thoſe in the abſence of his principal) is invalid; becauſe puniſhment or retaliation are remitted in the exiſtence of a doubt; and the abſence of the principal creates a doubt; nay, the *forgiveneſs* of the proſecutor is probable in ſuch a circumſtance, for this reaſon, that it is praiſeworthy and laudable to *pardon*: contrary to where the *witneſſes* only are abſent [from the execution,] as their *non*-retractation is moſt probable: and contrary, alſo, to where the proſecutor is *preſent*, as in this caſe there is no apprehenſion of his having *forgiven*.

Objection.—In caſe of the preſence of the principal, what neceſſity exiſts for the appointment of an agent?

Reply.—Even in ſuch caſe there may be a neceſſity for the appointment

Digitized by Google

pointment of an agent; becauſe, as *every* perſon is not perfectly acquainted with the mode of exacting thoſe rights, it follows that if the principal were debarred from the appointment of an agent, the door of exaction might be altogether cloſed.

—What is here advanced is according to *Haneefa*.—*Aboo Yooſaf* alleges that agency for the eſtabliſhment of corporal puniſhment or retaliation* (as if the agent ſhould produce the witneſſes) is not lawful.—The opinion of *Mohammed* coincides with that of *Haneefa*.—Some, however, maintain that he agrees with *Aboo Yooſaf*.—Others, again, ſay that this diſagreement ſubſiſts only in caſe of the *abſence* of the conſtituent, and not in caſe of his *preſence*; for, in this caſe, the agency is legal, according to all; becauſe the words of an agent in the preſence of his conſtituent refer entirely to the latter.—The argument of *Aboo Yooſaf* upon this point is, that the appointment of an agent is the creation of a deputy, in which there is always room for doubt reſpecting the deputation; and as, in criminal proſecutions, every doubt muſt be avoided, it follows that the appointment of an agent for *proſecution* is invalid, in the ſame manner as for the exaction of puniſhment; and that it cannot be admitted; in the ſame manner as evidence to evidence, reſpecting the proſecution, is not admitted.—The argument of *Haneefa* is, that proſecution is merely a *condition* of the exaction of the right; becauſe the neceſſity of the puniſhment is founded, not upon the *proſecution*, but upon the *criminality*, which is rendered manifeſt by the evidence of the witneſſes: and hence agency is admitted in this caſe, in the ſame manner as in that of other rights.—A ſimilar diſagreement ſubſiſts with reſpect to the caſe of a man againſt whom an action inducing corporal puniſhment or retaliation lies, and who appoints an agent for the management of his defence.—The doctrine of *Haneefa*, however, is preferred in this inſtance, becauſe the agent may make replies and rejoinders; and the doubt wtih reſpect to *deputation* (as before mentioned) does not prevent this.—If, however, the agent ſhould make a *con-*

A perſon under accuſation may employ an agent to conduct his defence.

---

* In other words, *for conducting a criminal proſecution.*

feſſion, it is not to be admitted againſt his conſtituent, becauſe there exiſts a doubt of his having been authoriſed by his conſtituent to make ſuch confeſſion.

An agent cannot be appointed to manage a ſuit unleſs the conſtituent be *ſick*, or *abſent*,

It is not lawful, according to *Haneefa*, to appoint an agent for the management of a cauſe, unleſs with the conſent of the adverſary; excepting where the conſtituent is ſick,—or diſtant three days journey, or further, from the place.—The two diſciples maintain that ſuch agency is lawful without the conſent of the adverſary; and *Shafeï* is alſo of the ſame opinion. This diſagreement does not relate to the legality of the agency itſelf, but to the neceſſity which operates upon the adverſary to anſwer to an agent to whoſe appointment he has not aſſented; *Aboo Haneefa* being of opinion that he is not under ſuch neceſſity; and the two diſciples thinking otherwiſe.—The argument of the two diſciples is that the appointment of an agent is the act of an individual in regard to a right purely *his own*; and therefore ought not to depend on the conſent of another in the preſent inſtance, any more than in a caſe of exacting payment of debt.—*Haneefa*, on the other hand, argues that the conſtituent is himſelf under the neceſſity of giving an anſwer, and muſt attend in caſe the magiſtrate ſhould ſummon him: now individuals differ with reſpect to their capacity of managing ſuits;—if, therefore, it were admitted that the appointment of an agent is abſolute with reſpect to the adverſary, this would be injurious to the adverſary;—hence the validity of the appointment muſt be ſuſpended on his conſent:—in the ſame manner as where a partnerſhip ſlave is made a *Mokátib* by one of the partners, in which caſe it remains with the other partner to confirm the contract of *Kitábit*, or to break it as he pleaſes; for, although the act of the firſt proprietor related purely to his own property, yet as the carrying of it into execution muſt have injured the right of the other, the validity of it is therefore ſuſpended on his conſent; and ſo alſo in the caſe in queſtion.—It is otherwiſe where the perſon is *ſick* or *abſent*, for in this caſe his appointment of an agent is valid without the conſent of the adverſary, ſince he cannot himſelf be compelled to appear under ſuch circumſtances.—It is to be obſerved that in the ſame manner as *Haneefa* holds the appointment, in this particular, of an agent by an abſent perſon to be valid, ſo alſo does he hold the appointment by one who is immediately about to travel.

or *about to travel.*

A WOMAN who remains in privacy, and is not accuſtomed to go to the court of the *Kâzee*, ought (according to *Aboo Bekir*) to appoint an agent for the management of her cauſe; and acquieſcence is incumbent on her adverſary.—This doctrine has been adopted by our modern lawyers; and decrees are paſſed accordingly.

A woman may appoint an agent for litigation in all caſes.

THE validity of agency, in any buſineſs, reſts upon two conditions:—FIRST, that the conſtituent be himſelf legally empowered to perform the buſineſs for the execution of which he has appointed another: (for, as the agent derives his competency from the conſtituent, it is neceſſary that the conſtituent ſhould himſelf be competent, before he confer the capacity on another;)—SECONDLY, that the agent be of ſound underſtanding, in ſuch a degree as may enable him to know and execute the buſineſs to which he has been appointed.—If, therefore, a perſon appoint a *child* or an *idiot* his agent, it is invalid; whereas, if a freeman, who is *adult* and of *ſound judgment*, appoint his *fellow* * his agent,—or, if a privileged ſlave appoint his *fellow* his agent,—it is valid.

Agency, to be valid, muſt proceed from a competent conſtituent;

and muſt be veſted in a perſon of underſtanding.

IF a perſon appoint an infant who underſtands purchaſe and ſale, or a *Mahjoor* (or *inhibited*) ſlave, to be his agent, it is in either caſe valid. The rights of the contract, however, do not appertain to *them* but to their *conſtituent*.—The reaſon of the validity of the appointment is that the *infant* is capable of explanation; and therefore his act is held to be valid, when done with the permiſſion of his guardian;—and the *ſlave*

A *Mahjoor* ſlave, or an *infant* (capable of underſtanding) may be appointed an agent:

---

* Meaning, one who reſembles him in thoſe points.

is capable of acting, and is the maſter of his actions when they relate to himſelf, though not if they relate to his maſter; but agency for another does not relate to his maſter. The appointment of the infant or ſlave, therefore, is valid.—They are neither of them, however, capable of performing the obligations of the contract:—the *infant*, becauſe of his want of competency;—and the *ſlave*, becauſe it would interfere with the rights of his maſter;—the performance of the contract, therefore, reſts with the conſtituent.—It is related as an opinion of *Aboo Yooſaf*, that if an infant, or a ſlave, as above deſcribed, ſhould make a ſale, and the purchaſer, being ignorant of their ſituation, ſhould afterwards be informed of it, in that caſe it is in his option to annul the contract,—becauſe having concluded the bargain on a ſuppoſition that they were competent to fulfil the rights of it, and being afterwards informed that the rights of the contract did not reſt with them, he becomes of conſequence entitled to annul it in the ſame manner as if he had diſcovered a defect in the ſubject of it.

but the obligations they enter into are not binding upon *them*, but upon their *conſtituent*.

THE contracts concluded by agents are of two kinds.—FIRST, ſuch as the agent refers to himſelf; and which do not depend, in any degree, on the conſtituent; as in the caſes of *ſale* or *hire*, which relate to the *agent* and not to the *conſtituent*.—(*Shafeï* maintains that the rights of ſale appertain to the *conſtituent*; becauſe the rights of a contract of ſale are dependants of the *effects* of it; and as the *effect*, namely, *right of property*, appertains to the conſtituent, ſo in the ſame manner its *dependant* alſo appertains to him: an agent for ſale, therefore, is the ſame as a *meſſenger*, or an agent for marriage.—The arguments of our doctors are that an agent is the contracting party, both in *reality* and in *effect*:—in *reality*, becauſe the contract is formed by ſpeech, and the ſpeech of the agent is authentic becauſe he is a *man*: and in *effect*, becauſe, being himſelf competent, there is no neceſſity for the reference of the rights of the contract to the conſtituent; whereas, if he were merely a *meſſenger*, he would not be exempt from the neceſſity of referring the rights of the contract to the conſtituent,

Contracts concluded by agents are either ſuch as the agent refers to *himſelf*, conſtituent, as is the caſe with a meſſenger.—Now ſince ſuch is the nature of agency, it follows that an agent is conſidered as a *principal* in regard to the rights of the contract; and hence *Kádooree*, in the treatiſe which bears his name, ſays "an agent for ſale delivers the "goods and takes poſſeſſion of the purchaſe money, and is liable to "be ſued for any defect in the ſubject of the ſale;—and, on the other hand, "an agent for purchaſe receives the goods, and delivers the "price, and may ſue the ſeller for any defect in the goods;"—becauſe all theſe are conſidered as the rights of ſale. The conſtituent, moreover, is the proprietor of the thing purchaſed through his agent, *ab initio*; in the ſame manner as when a ſlave accepts a gift, or catches game, or gathers fire-wood; in all which caſes the maſter is proprietor of the gift, of the game, or of the fire-wood, *ab initio*; that is to ſay, the property is not held firſt to reſt in the ſlave, and then to ſhift to him.—This doctrine of the primary exiſtence of the right of property in the conſtituent is approved:—contrary to *Kobrokhee*, who maintains that, in conſequence of the purchaſe, the right of property reſts originally in the agent, and from him ſhifts to the conſtituent.)—SECONDLY, ſuch as the agent refers the performance of to his conſtituent, and in which he has an immediate intereſt; ſuch as *marriage*, *Khoola*, or compoſition for wilful murder; in all which caſes, the rights appertain to the *conſtituent* and not to the *agent*.—Hence no demand can be made on the huſband's agent for the dower; nor can the *wife*'s agent be required to deliver over the dower to her huſband; for in theſe caſes the agent is a mere *meſſenger*, and is not exempt from the neceſſity of referring the performance to his conſtituent: for if the agent, in the caſe of marriage, were to refer the performance to *himſelf*, it would become *his* marriage, and not that of the *conſtituent*; (whence the neceſſity for conſidering him as a *mere meſſenger*.)—The reaſon of this is, that as none of theſe contracts are of a nature to admit of the *agent* firſt acting in them as a *principal*, he is therefore obliged to refer them to the conſtituent, and to act himſelf as a mere *meſſenger*.—Manumiſſion for a compenſation, contracts of *Kitábat*, and

or to his *conſtituent*.

compoſitions after *denial*, are all of the *ſecond* claſs.—With regard to compoſition after *acknowledgment*, it is of the firſt claſs, as partaking of the nature of ſale.—An agent for the delivery of a gift, or of charity, or for the reſtitution of a depoſit, as being a mere *announcer*, is the ſame as a *meſſenger*. The caſe is alſo the ſame with regard to an agent for the execution of loans or pledges; becauſe the *effect* of theſe (namely, the right of property) is eſtabliſhed by means of the ſeizin of the thing given or beſtowed in charity, and ſo on;—and as the thing, in theſe caſes, belonged to the conſtituent and ſhifts to the donee or the other in conſequence of the ſeizin, the agent, being as it were a mere *ſtranger* to the thing, cannot be conſidered as a *principal*, but muſt be regarded merely as an *explainer* or a *meſſenger*.—It is otherwiſe in *ſale*, becauſe the effect of ſale is eſtabliſhed by *ſpeech*, and the agent is the *ſpeaker*.—In the ſame manner, alſo, as an agent in the above caſes of executing gifts, &c. is a mere *meſſenger*, ſo is an agent appointed by the petitioner, (or perſon to whom the gift, the charity, &c. is given.) The caſe is the ſame with reſpect to an agent for a contract of co-partnerſhip or *Mozáribat*. With reſpect to an agent for the receipt of a loan, the appointment is null; inſomuch that, if a perſon, in virtue of ſuch appointment, ſhould receive a loan, and take poſſeſſion of it, *he*, and not the *conſtituent*, would be the *proprietor* of it. It is otherwiſe with reſpect to a *meſſenger*; for the receipt of a loan by a meſſenger is lawful.

An agent cannot be appointed to receive a *loan*.

A debt contracted to an *agent* cannot be exacted by his *conſtituent*;

but if payment be made to the conſtituent, it is valid:

If a conſtituent, in the caſe of having ſold goods through his agent, ſhould demand payment of the price from the purchaſer, the purchaſer may lawfully refuſe to comply; becauſe, with reſpect to the contract or its rights, the conſtituent is as a *ſtranger*, ſince the rights of the contract appertain to the contracting party. If, however, the purchaſer pay the price to the conſtituent, it is lawful; nor is the agent afterwards entitled to demand it from him, ſince he has paid it to the conſtituent, to whom it of right belonged:—but if the agent perſiſt in demanding it from him, then let him take it back from the conſtituent and pay it to the agent, and let the agent give it to the conſtituent; a mode in which there is evidently no advantage to any.—It is to be obſerved that as the right belongs to the conſtituent, the purchaſer may, in caſe of the conſtituent being indebted to him, deduct the debt from the price. If, however, the conſtituent and agent be *both* indebted to him, he is only entitled to deduct from the price the debt of the *conſtituent*.—If, on the other hand, the *agent* only be indebted to him, he is at liberty (according to *Haneefa* and *Mohammed*) to deduct it from the price; becauſe the agent (as they hold) may, if he pleaſe, exempt the purchaſer entirely from the payment. In either caſe, however, (that is, whether the purchaſer make a deduction on account of the debt due by the agent, or whether the agent exempt him entirely,) the agent is reſponſible for the whole to his conſtituent.

and the debtor may (in his payment) deduct a debt owing him by the *conſtituent*; or by the *agent*, (when he alone is indebted to him.)

CHAP. II.

Of Agency for *Purchaſe* and *Sale*.

SECT. I.

Of AGENCY *for* PURCHASE.

WHEN a perſon appoints another his agent for purchaſing ſome indefinite thing, it is neceſſary that he explain the *kind* and *quality* of the thing, or the *kind* and *price* of it; in order that the agent

An agent muſt be properly inſtructed with reſpect to what he is to purchaſe,

Digitized by Google

may know the nature of the act for which he has been appointed, and thence become capable of executing it.

except where his powers are *general.*

If, however, a perſon appoint another an *abſolute* agent, by ſaying to him, "purchaſe for me whatever thing you may judge adviſeable," in that caſe the explanation of the *kind*, &c. is unneceſſary, becauſe the conſtituent, in this inſtance, charges the agent with a diſcretionary care of his intereſts; and whatever he may then purchaſe is conſidered as in obedience to his order.—In fact, a *ſmall* degree of uncertainty in agency (ſuch as an uncertainty of the *quality*) is of no conſequence, according to a favourable conſtruction of the law; becauſe agency is founded on liberal principles; and making an explanation of the *quality* an eſſential would be a reſtraint upon it.

An agency is invalid where the terms in which it is expreſſed leave a *great degree* of uncertainty with reſpect to the *ſubject* of it;

If the conſtituent, in the appointment of his agent, ſhould uſe a word applicable to a variety of general kinds, ſuch as *animal*,—or a word which ſerves to expreſs a variety of meanings, ſuch as *Dár* *,—in this caſe the appointment of agency is invalid, even although the conſtituent may have ſpecified the amount of the price; for articles of each kind may be purchaſed for the ſame price; and it is not known which kind the conſtituent wiſhes.—Hence the agency in this caſe, on account of the *great degree* of uncertainty, becomes impracticable. If, alſo, the word uſed be applicable to a *variety of ſpecies*, the agency is invalid, unleſs the conſtituent ſpecify the price, or define the ſpecies, though he ſhould not mention the goodneſs or badneſs of the *quality*. If, however, he ſpecify the price, or define the quality, the agency is valid, becauſe the *ſpecification of the price* leads to a knowledge of the ſpecies; and the mention of the ſpecies leaves only the uncertainty of the *quality*, which is conſidered a degree of uncertainty ſo *trifling* as not to prevent the execution of the agency. Thus, if a perſon conſtitute another his agent for the purchaſe of "a *ſlave*, whether

---

* This word ſignifies a *houſe*, a *ſlake*, and a variety of other meanings.

" *male* or *female*;" the agency is invalid, becauſe " a ſlave, whether " male or female," applies to a variety of ſpecies. If, however, he explain the particular ſpecies, (ſuch as *Turkiſh*, *Abyſſinian*, *Indian*, or of a *mixed deſcent*,) the appointment is valid.—In the ſame manner, alſo, the appointment is valid where the *price* only is ſpecified, becauſe in that caſe (as was before explained) a *ſmall degree* only of uncertainty remains.—It is recorded in the *Jama Sagheer*, that if a perſon deſire another to purchaſe for him *cloth*, or an *animal**, or a *houſe*, the agency is invalid, becauſe of the great degree of uncertainty; as the term *dába* (for inſtance) means every animal that moves on the face of the earth, although, in common acceptation, it ſignify either a *horſe*, an *aſs*, or a *mule*;—in the ſame manner, *cloth* is a generic term, applicable to a variety of ſpecies from the fineſt ſilks to the coarſeſt ſheet of cotton; and the term *houſe* is applied to things which (with reſpect to *ſpecies*) are conſpicuouſly different from each other, from a variety of cauſes, ſuch as *neighbourhood*, the abundance or paucity of rights and privileges, or the ſituation in particular lanes or cities: from the great uncertainty in all theſe caſes, therefore, the agency is invalid; but it becomes valid in caſe of an explanation of the price of the houſe, or the ſpecies of the cloth or *animal*.

unleſs in caſe of ſubſequent explanation.

A power to purchaſe *táam* [food] is reſtricted to the purchaſe of *wheat* or *flour*.

IF a perſon give another a hundred *dirms*, and ſay to him " buy " for me, with theſe *dirms*, *food*;" in that caſe the word *food* is conſtrued to mean *wheat*, or the *flour of wheat*, on a favourable conſtruction.—Analogy would ſuggeſt the meaning to be *any kind of food whatever*, according to the real import of the word.—The reaſon for a more favourable conſtruction, in this particular, is that the word *táam* [food,] when uſed in purchaſe and ſale, means (according to general cuſtom,) *wheat* and the *flour* of it; and as *general cuſtom* muſt be preferred to mere *analogy*, the law, for that reaſon, in all caſes of purchaſe and ſale, conſtrues the word *táam* [food] to mean *wheat*, or the *flour* of it.—Some have ſaid that if the conſtituent, in this caſe, give *many dirms*, (*ten*, for inſtance,) then the word *food* is conſtrued to mean *wheat:* if, on the other hand, he give a *few dirms*, (*three*, for inſtance,) it is conſtrued to mean *bread made of wheat*; and if a *middle* number, (ſuch as *ſeven*,) it is conſtrued to mean the *flour* of wheat.

---

* Arab. *Dâba*.

An agent may return goods purchaſed by him to the ſeller, on account of a *defect*;

but not after having delivered them to his conſtituent.

If an agent, after purchaſe, diſcover a defect in the goods, he may then return them to the ſeller; becauſe the rejection of the ſubject of ſale on account of a defect is one of the rights of a contract of ſale; and the agent, as being one of the *contracting parties*, is entitled to all the rights of the contract.—This, however, is only where the agent has not delivered over the goods to his conſtituent; for, after that, he cannot return it to the ſeller unleſs by permiſſion of the conſtituent; becauſe, after delivering the goods bought to his conſtituent, his agency ceaſes; and alſo, becauſe, if he were then permitted to return the goods to the ſeller without the conſent of the conſtituent, the ſeizin made by the conſtituent in his own behalf would be ſet at nought.—(It is to be obſerved that as, previous to the delivery of the goods to the conſtituent, the rights of the contract reſt with the agent, and ceaſe and expire after the delivery, it follows that if a perſon claim his right of *Shaffa* * in a houſe purchaſed by an agent, he has a right to ſue the agent previous to the delivery of the houſe to his conſtituent; but after the delivery no action would lie againſt the agent.)

A right of pre-emption may be enforced againſt an agent before delivery to his conſtituent; but not afterwards.

Agency in *Sirf* or *Sillim* is valid.

If a perſon appoint an agent for executing a contract of *Sirf* or *Sillim* † it is valid; becauſe the conſtituent being himſelf competent to theſe contracts may lawfully (on the principles already explained) empower another to execute them on his behalf. It is to be obſerved, however, that the *Sillim* here mentioned means a *purchaſe* by way of *Sillim* (or advance,) and not a *ſale* by that mode; becauſe, if a *ſale* of that nature were allowed by agency, it would neceſſarily follow that the agent muſt himſelf become liable for a particular article in lieu of a price which he has not received.—It is likewiſe to be obſerved that if, in either of theſe caſes, (that is, either the contract of *Sillim* or *Sirf*,) the agent (who is the *buyer*) be ſeparated from the ſeller,—previous to his ſeizin of the goods, in the caſe of *Sillim*,—or, to the mutual ſeizin of the article of exchange in caſe of the *Sirf*,—the contract becomes null; becauſe the agent being a party, his ſeparation from the other party previous to the ſeizin is the cauſe of annulment of both contracts: (contrary to where the conſtituent is ſeparated from the *ſeller* before the ſeizin; becauſe not being himſelf a party, his ſeparation is of no conſequence.)—Since, therefore, the agent is a *party*, it follows that his ſeizin and delivery are valid, although he be one to whom the rights of a contract cannot appertain, (ſuch as an *infant* or an *inhibited ſlave*.) It is different with regard to a *meſſenger* in a contract of *Sillim* or *Sirf*; for his ſeizin is not valid, as *his* function relates to the *contract* and not the *ſeizin*; becauſe a meſſenger merely delivers the ſpeech of his employer to another; and ſeizin is no way connected with ſpeech. Moreover, a ſpeech delivered by a meſſenger refers itſelf to the dictator of the meſſage; a meſſenger is, therefore, not conſidered as a party; and hence his ſeizin, as being the ſeizin of a *ſtranger*, is not valid.

---

* A right of *neighbourhood*, which gives the neighbour a privilege of re-emption.—It is fully treated of under the head of *Shaffa*.

† See *Sales*.

An agent, paying for goods with his own money, is entitled to repayment from his conſtituent.

If an agent for purchaſe pay the price of the goods from his own property, and obtain poſſeſſion of them, he is entitled to repayment from his conſtituent, for two reaſons.—First, he ſtands as a *ſeller*, and the conſtituent as a *purchaſer*; becauſe a virtual exchange is eſtabliſhed between them; (whence it is that if an agent and his conſtituent diſagree, with reſpect to the *price*, an oath is tendered to both, as holds in all mutual exchanges of property for property; and the conſtituent may alſo return the thing purchaſed to the agent, on account of any defect:)—when, therefore, the thing purchaſed is duly delivered to the conſtituent by the agent, the agent is entitled to take from him the price he may have given for it:—secondly, as the rights of the contract appertain to the agent, and as the conſtituent is informed of this, it follows that he gives his conſent to the agent's payment of the price from his own property. If, therefore, the goods be loſt in the hands of the agent, and he ſhould not previouſly have made a detention in his own behalf of thoſe goods from his conſtituent, the loſs in that caſe falls upon the conſtituent, and he becomes liable for the price to the agent; becauſe the ſeizin of the agent, ſo long as he makes no formal detention of the purchaſe from his conſtituent, ſtands as the ſeizin of the conſtituent; and therefore he is held to have been virtually poſſeſſed of the goods whilſt the loſs took place.

An agent may detain from his conſtituent what he purchaſes, until he be paid the price:

An agent is entitled to detain from his conſtituent any purchaſe he may have made on his account, until he be paid the price by him, according to what was before ſaid, that the agent ſtands as the *ſeller*, and the conſtituent as the *purchaſer*.—*Ziffer* maintains that the agent is not entitled to detain the purchaſe, as the conſtituent has already made ſeizin of it; becauſe, as the ſeizin of the agent is, virtually, the ſeizin of the conſtituent, it is conſequently the ſame as if the agent had actually delivered them over to him: the agent's right of detention, therefore, (in ſatisfaction of his claim to payment of the price,) ceaſes, in the ſame manner as in caſe of his actual delivery of them. Our doctors, on the other hand, argue that the delivery of the goods to the conſtituent (on the principle of the ſeizin of the agent being the ſeizin of the conſtituent) is a matter of neceſſity; but does not imply any conſent on the part of the agent to the relinquiſhment of his right of detention.—The ſeizin of the agent, moreover, is not the *actual* ſeizin of the conſtituent; but is rather *ſuſpended*.—If, therefore, the agent ſhould not detain the goods from his conſtituent, his ſeizin ſtands as the ſeizin of his conſtituent; but if he detain them, his ſeizin is then conſidered as on his own behalf.

but if the purchaſe periſh in the agent's hands during ſuch detention, he is reſponſible.

IF, in the caſe before ſtated, the agent *detain* the purchaſe from his conſtituent, and it periſh in his hands, he is anſwerable, according to *Aboo Yooſaf*, in the ſame manner as for a *pledge* *.—*Mohammed* is of opinion that he is anſwerable in the ſame degree as when goods, the ſubject of a ſale, decay, or are loſt, in the hands of the ſeller, in which caſe the reſponſibility is for the *price*, not for the *value*;—that is, the purchaſer is exempted from the payment of the *price*;—and ſuch is alſo the doctrine of *Haneefa*.—*Ziffer*, on the contrary, is of opinion, that reſponſibility attaches in the ſame degree as in a caſe of *uſurpation* †; as the detention has been made without any right.—The argument of *Haneefa* and *Mohammed* is that the agent ſtands as the *ſeller* of the article in queſtion to the conſtituent, and detains it from him in order that he may exact payment for it; and conſequently that the conſtituent ſtands acquitted of the price on the decay or deſtruction of the article in the hands of the agent.—The reaſoning of *Aboo Yooſaf* is that the thing in queſtion, in the hands of the agent, was not *at firſt* a ſubject of reſponſibility, but became ſo in conſequence of detention with a view to ſatisfaction for the price; and the ſame is the actual property of a pledge:—contrary to a *purchaſe*; as that is a ſubject of reſponſibility in the hands of the ſeller *from the firſt*, and not becauſe of detention for the price. A contract of ſale, moreover, is cancelled in conſequence of the loſs of the ſubject of it; but in the caſe in queſtion, the original contract between the agent and ſeller is not annulled.—*Haneefa* and *Mohammed*, however, maintain that though the original contract of ſale be not annulled, yet the contract which virtually ſubſiſts between the agent and conſtituent is annulled, in the ſame manner as if the conſtituent were to return the goods to the agent on the diſcovery of a defect.

---

* That is, not at the rate of the *eſtimated price*, but of the *actual value*.

† That is, at the rate of the *full value*, whatever that may be.

IF

Caſe of an agent purchaſing, at the rate of his inſtruction, a larger quantity of an article than was ſpecified in the inſtruction.

If a perſon appoint another his agent for the purchaſe of ten *ratls* * of fleſh for one *dirm*, and the agent purchaſe twenty *ratls*, for one *dirm*, of that kind of fleſh which is ſold at the rate of ten *ratls* for one *dirm*; in that caſe (according to *Haneefa*) it is incumbent on the conſtituent to take only ten *ratls* for *half* a *dirm*. The two diſciples maintain that it is incumbent on him to take the twenty *ratls* for one *dirm*. In ſome copies of *Kadooree* it is written that *Mohammed* coincides in opinion with *Haneefa*, and that his doctrine in the *Mabſoot* is not incompatible with it, he having only obſerved there, that "the conſtituent ought to take ten *ratls* for a half *dirm*."—The argument of *Aboo Yooſaf* is that the conſtituent ordered the agent to expend his *dirm* in the purchaſe of fleſh, under a conception of the price being at the rate of ten *ratls* per *dirm*: when, therefore, the agent purchaſed twenty *ratls* for the *dirm*, as he appears to purchaſe them on account of his conſtituent, he is conſequently entitled to take the whole; in the ſame manner as where a perſon empowers another to ſell his ſlave for a thouſand *dirms*, and the agent obtains *two* thouſand; in which caſe the conſtituent is entitled to the whole of the ſum ſo obtained.—The argument of *Haneefa* is that the conſtituent having expreſsly enjoined the purchaſe of *ten ratls*, it follows that the exceſs muſt be conſidered as having been purchaſed by the agent on account of *himſelf*,—and for which he muſt accordingly pay the price:—contrary to where an agent, being empowered to ſell a ſlave for a thouſand *dirms*, obtains two thouſand for him; becauſe, in this caſe, the exceſs being in exchange for the property of the conſtituent, is conſequently his right.—If, however, the agent were to purchaſe for one *dirm* twenty *ratls* of fleſh of that kind which is ſold at the rate of twenty *ratls* per *dirm*, the purchaſe (in the opinion of all our doctors) is made by the agent for *himſelf*; becauſe the object of the conſtituent was evidently *fat* meat, and that object has not been here obtained.

---

* A *ratl* is about one pound, *Troy* weight.

If a perſon appoint another his agent to purchaſe for him ſome ſpecific article, in that caſe the agent is not entitled to purchaſe the article for *himſelf*; becauſe this is a breach of the truſt repoſed in him by his conſtituent; and alſo, becauſe it is a diſmiſſion of himſelf from his appointment, which he is not (in the opinion of ſome) empowered to do, unleſs in the preſence of his conſtituent.—If, however, the conſtituent ſhould have ſpecified the price of the article, and the agent purchaſe it for a price of a different ſpecies from that mentioned by the conſtituent; or if, the conſtituent not having ſpecified the price, the agent purchaſe the article, not for *dirms*, but for ſomething eſtimable by weight or meaſurement of capacity; or, laſtly, if the agent appoint another agent, and that ſecondary agent purchaſe the article in the abſence of the primary agent; in all theſe caſes the purchaſe is held to have been made on behalf of the agent himſelf, and not of his conſtituent, becauſe of the deviation from his conſtituent's orders.—If, on the other hand, the *ſecondary* agent conclude the bargain in the preſence of the *primary* agent, the purchaſe is in that caſe conſidered as made for the conſtituent, becauſe the wiſdom and judgment of the primary agent is held (in conſequence of his preſence) to have been exerted; and hence there is no deviation from the orders of his conſtituent.

An agent cannot purchaſe for himſelf any ſpecific article which he is directed to purchaſe for his conſtituent;

unleſs he purchaſe it for ſomething of a different nature from the price ſpecified;

or through the mediation of another agent.

If a perſon appoint another to purchaſe for him an indefinite ſlave, and the agent accordingly purchaſe a ſlave; in that caſe the ſlave belongs to the agent himſelf*, unleſs he declare "I intended the purchaſe for my conſtituent,"—or unleſs he make the purchaſe with the conſtituent's property.—The compiler of the *Hedàya* remarks that this caſe may occur in various ſhapes.—First, where the agent refers the contract to his *conſtituent*'s money, as if he ſhould ſay "with "this thouſand *dirms* (meaning thoſe of his conſtituent) I have pur-

Caſe of agency in the purchaſe of an indefinite ſlave;

which admits of four deſcriptions.

---

[*] That is, the agent is conſidered as having made the purchaſe on *his own* account, and conſequently muſt pay the price out of *his own property*.

Digitized by Google

"chaſed this ſlave;" in which caſe the ſlave goes to the conſtituent. (This is the caſe which is meant by the above expreſſion "or unleſs "he make the purchaſe with the conſtituent's property;" for that does not mean "that he ſhall firſt make the purchaſe for a thouſand "*dirms*, *generally*, and then pay it from the property of his conſti-"tuent.")—Secondly, where the agent refers the contract to his *own* money; in which caſe, the ſlave, for evident reaſons, belongs to the agent himſelf, ſince he has referred the contract to his *own* property.—Thirdly, where the agent refers to *money in general*; in which caſe the purchaſe is made either for himſelf or his conſtituent, as he may have reſolved in his mind at the time;—becauſe the agent, in a caſe of the preſent deſcription, is at full liberty either to make the purchaſe for himſelf, or for his conſtituent. If, therefore, the agent and conſtituent diſagree, (the agent aſſerting that he intended the purchaſe for himſelf, and the conſtituent declaring that he intended it for *him*,) then the payment of the price muſt determine; that is, the ſlave is adjudged to him from whoſe property the price is paid.—If, on the other hand, it be admitted by both that no reſolution was formed, *Mohammed* alleges the ſlave, in this caſe, to be the property of the *agent*; becauſe of his being the contracting party, and alſo, becauſe of the probability there is that every one acts for himſelf, unleſs where it can be proved to the contrary, which the caſe in queſtion does not admit of.—*Aboo Yooſaf* is alſo of opinion that the *payment of the price* ought to determine the right to the purchaſe; becauſe it ſerves as a criterion to determine the action of the agent, which otherwiſe admits of two ſuppoſitions; and alſo, becauſe, if the purchaſe were to be conſidered as made on account of the agent, notwithſtanding his having paid the price from the property of the conſtituent, it would follow that the agent is an *uſurper*. This concluſion of *Aboo Yooſaf*, however, (that the agent would, under theſe circumſtances, be an *uſurper*,) does not neceſſarily follow: on the contrary, he cannot otherwiſe be conſidered than as in the caſe where the parties diſagree with reſpect to the *intention*; which we

Digitized by Google

we have already explained.—It is to be obſerved that all the ſeveral modes here deſcribed apply equally to the appointment of an agent for the management of a contract of *Sillim*.

Caſe of diſpute between the agent and conſtituent reſpecting a ſlave who, after being purchaſed by the agent, dies in his hands.

If a perſon appoint another to purchaſe for him a ſlave for a thouſand *dirms*, and the agent afterwards inform him that "he had accordingly purchaſed for him a ſlave for a thouſand *dirms*, but that "the ſlave had died in his poſſeſſion,"—and the conſtituent, on the other hand, aſſert that "he had purchaſed the ſaid ſlave for *himſelf* and "not for *him*;"—in this caſe the aſſertion of the conſtituent, corroborated by an oath, muſt be credited.—This, however, proceeds on a ſuppoſition that the conſtituent had not previouſly delivered the ſaid thouſand *dirms* to his agent:—for if he ſhould have given the thouſand *dirms*, the declaration of the *agent* muſt be credited; becauſe, in the former inſtance, the agent gives information of his performance of an act which he is not now capable of carrying into full execution, (ſince he cannot purchaſe a ſlave who is *dead*,) and his object is to get a thouſand *dirms* from the conſtituent, who, on the other hand, denies his right; and the word of a defendant is creditable before that of a plaintiff: and, in the *latter* inſtance, the agent is a *truſtee*, having the price in his hands as a *depoſit*; and his object being to obtain a releaſement from his truſt, his aſſertion is therefore credited.—If, however, the ſlave be actually *alive* at the time of the diſagreement, the declaration of the agent muſt be credited, (according to *Haneefa* and *Mohammed*,) whether the conſtituent have delivered the price or not; becauſe the agent gives information of his having performed an act which he is capable at that inſtant of carrying fully into execution, (ſince it is in his power to purchaſe this ſlave, as he is *living*,) and hence his word is not liable to ſuſpicion.—According to *Haneefa*, indeed, if the conſtituent ſhould *not* have delivered the price, *his* aſſertion muſt be credited, as the agent is in this caſe liable to the ſuſpicion of having firſt purchaſed the ſlave on account of *himſelf*, and aſſerting afterwards (on the diſcovery of a defect) that he has purchaſed him for his *conſtituent*. It is otherwiſe where he has already received the purchaſe-money, becauſe then he is conſidered as a *truſtee* of it, and his aſſertion is credited, as it tends to procure him a releaſement from his truſt:—whereas, in the other caſe, he cannot be conſidered as a *truſtee*, ſince the purchaſe-money is not in his poſſeſſion.

In a caſe of diſpute between an agent and conſtituent reſpecting the purchaſe of a *ſpecific* ſlave, the declaration of the *agent* muſt be credited.

If a perſon deſire his agent to purchaſe for him a ſpecific ſlave, and they afterwards diſagree during the life-time of the ſlave, (the conſtituent aſſerting that the agent had purchaſed him for *himſelf*, and the agent declaring that he had purchaſed him for his *conſtituent*,) in this caſe it is univerſally agreed that, whether the conſtituent may have delivered to him the price or not, the aſſertion of the agent muſt be credited; becauſe the agent gives information of his performance of an act which he is at that moment capable of carrying fully into execution; and alſo, becauſe he is not in this caſe liable to any ſuſpicion, ſince an agent for the purchaſe of a ſpecific thing cannot purchaſe that thing for himſelf in the abſence of his conſtituent, for the reaſons already explained: in oppoſition to the caſe of an *indefinite* thing, (according to the doctrine of *Haneefa*, as exhibited above.)

An agent, avowing his commiſſion, cannot afterwards retract, unleſs the alleged conſtituent *deny* the commiſſion.

If one perſon ſay to another "ſell to me this ſlave in behalf "of *Omar*, who is my conſtituent;" and the ſlave be accordingly ſold, and the agent afterwards deny that he had been authoriſed to make the purchaſe by *Omar*, and *Omar* then appear, and aſſert that he had deſired the ſaid agent to purchaſe the ſaid ſlave for him,—in this caſe *Omar* is entitled to take the ſlave, becauſe the agent has himſelf acknowledged his agency on his behalf, and denial after acknowledgment is of no effect.—If, on the other hand, *Omar* ſhould *deny* his having authoriſed the purchaſe, in that caſe he is not entitled to take the ſlave, becauſe the acknowledgment of the agent is ſet aſide by the denial of *Omar*.—But if, under theſe circumſtances, the purchaſer ſhould deliver the ſlave to *Omar*, it becomes then a contract of ſale, for which the original purchaſer is reſponſible, ſeeing that *Omar* has purchaſed it from him after the mode of *Taata*, that is by mutual gift, as when a perſon buys a thing for another without his authority and then delivers the ſaid thing to that other.—The doctrine of this caſe ſhews that the delivery of a thing according to ſale, ſuffices to eſtabliſh a ſale by *Taata* or mutual gift, even although the giving and receiving of the price ſhould not have taken place; and it alſo ſhews that a ſale by *Taata* in things of great or little value is eſtabliſhed by the mutual conſent of the parties.—This is the authentic doctrine in the caſe of ſuch ſales.

An agent is at liberty, if he chuſe, to purchaſe only one of two ſlaves ſpecified:

If a perſon commiſſion another to purchaſe for him two ſpecific ſlaves without mentioning the price, and the agent purchaſe *one* of them, it is valid; for in this inſtance the appointment of agency is valid, and does not reſtrict the agent to purchaſe both of the ſlaves by one contract, which is often impracticable, becauſe of the objection of the proprietor to include them both in one contract.—The agent may therefore lawfully purchaſe one out of two ſlaves, unleſs when he does it by deceit, as his agency authoriſes him only to make a *juſt* purchaſe, which precludes him from making a *deceitful* one.—The doctrine in this caſe is univerſally agreed to.

If a perſon deſire another to purchaſe him two particular ſlaves, without mentioning the price, and the agent purchaſe *one* of theſe ſlaves, it is valid; becauſe the appointment of the agent, in this inſtance, is *general*;—(in other words, does not reſtrict the agency to the purchaſe of *both* ſlaves by one *contract*;) and it ſeldom happens that *two* ſlaves are purchaſed by *one* contract, as a maſter ſeldom ſells two ſlaves by one contract. It is lawful for the agent, therefore, to purchaſe *one* of the two;—(unleſs, indeed, the purchaſe be made at an evident *diſadvantage*, which would be contrary to the end of the appointment.)

but not if the purchaſe be at an evident diſadvantage:

nor if the price exceed the rate expreſſed in his inſtructions; unleſs the difference be trifling.

If a perſon deſire another to purchaſe for him *two* ſpecific ſlaves (who are ſuppoſed to be of equal value) for one thouſand *dirms*, and the agent purchaſe one of theſe ſlaves for five hundred *dirms* or leſs, it is valid, according to *Haneefa*.—If, however, he ſhould purchaſe him for *more* than five hundred *dirms*, the contract is not binding on his conſtituent. The reaſon of this is that the conſtituent, having oppoſed one thouſand *dirms* to the two ſlaves, who are equal in value, did of conſequence intend that the agent ſhould pay five hundred *dirms* for each. The agent, therefore, in paying five hundred *dirms*, conforms exactly to the orders of his conſtituent; and although, in paying leſs for him, he *does* deviate from his orders, yet this being a laudable deviation, in favour of his employer, is therefore binding. In purchaſing him, on the other hand, for *more* than five hundred *dirms*, whether the exceſs be great or ſmall, he is guilty of a deviation from his orders unfavourable to the intereſts of his employer, and which is therefore not allowed; unleſs, indeed, the agent purchaſe the other ſlave for the ſum remaining to complete the thouſand *dirms*, before any litigation happen between him and his conſtituent, for the former purchaſe.—What is here advanced proceeds upon a favourable conſtruction of the law. Analogy would ſuggeſt that the contract, in this caſe, ought not to be binding on the conſtituent, becauſe of the deviation from his orders.—The reaſon for a more favourable conſtruction, in this particular, is that the purchaſe of the two ſlaves for one thouſand *dirms* (which is the expreſs object of the conſtituent) is here obtained; and that the limitation of their prices to five hundred each, in an equal manner, is only an *implied* object, ſince it requires to be eſtabliſhed by reaſoning; and an *expreſs* object is always preferred to an *implied* one.—The two diſciples maintain that if, in the caſe in queſtion, the agent ſhould have purchaſed one of the two ſlaves for *more* than five hundred *dirms*, by a contract diſadvantageous only in a *ſmall* degree, (which cannot always be avoided,) and the money remaining ſuffice for the purchaſe of the other ſlave, it is valid; becauſe the agency is *abſolute*, (that is to ſay, is not reſtricted to the payment of five hundred *dirms* for *one* ſlave,) although it be reſtricted to *a juſt and proper contract*, which that in queſtion may be conſidered, as the diſadvantage attending it is not *great* and *obvious*.—It is, however, abſolutely neceſſary that the ſum remaining ſuffice to purchaſe the other ſlave, in order that the object of the conſtituent (namely *the purchaſe of both for one thouſand dirms*) be obtained.

An agent may liquidate a debt due from him to his conſtituent, by the purchaſe of a ſpecific article;

IF a perſon deſire another, who owes him one thouſand *dirms*, to purchaſe with it a ſpecific ſlave, and the agent act accordingly, it is lawful; becauſe a ſpecification of the ſubject of ſale amounts to a ſpecification of the *ſeller*; and as a ſpecification of the *ſeller* would have been lawful, (for reaſons which will hereafter appear,) ſo, in the the ſame manner, the ſpecification of the *ſubject* is alſo lawful.

but if the article be not ſpecified, and periſh, after purchaſe, in the agent's hands, the debt is not liquidated.

IF a perſon deſire another, who is indebted to him one thouſand *dirms*, to purchaſe with it an indefinite ſlave; and the debtor accordingly purchaſe a ſlave, and the ſlave die before the delivery of him to the conſtituent; in that caſe the ſlave is held to have been the property of the *agent*.—If, on the other hand, he die *after* delivery to the conſtituent, he is then held to have been the property of the conſtituent.—This is the doctrine of *Haneefa*.—The two diſciples allege that the property of the conſtituent commences on the inſtant of the agent obtaining poſſeſſion of the ſlave.—A ſimilar diſagreement ſubſiſts with regard to the caſe of a creditor appointing his debtor to make a purchaſe with the debt, either by a contract of *Sillim* or *Sirf*.—The argument of the two diſciples is that *dirms* and *deenars*, whether *ready money* or *debt*, are not ſpecific when oppoſed to any thing in a contract of exchange: (whence it is, that if a perſon were to ſell a ſpecific and exiſting article, in exchange for a debt, and both parties agree that the purchaſer does not owe the ſeller any thing, yet the contract of ſale is not rendered void:) it is therefore the ſame whether they be ſpecified or not *; and conſequently the contract of the agent is binding on the conſtituent, becauſe *his* ſeizin is equivalent to that of his *conſtituent.*—The argument of *Haneefa* is that *dirms* and *deenars* admit of ſpecification in agency; (whence it is that if a perſon reſtrict his agent to the purchaſe of ſomething with one thouſand *ſpecific dirms*, or with a *debt*, and the ſpecific *dirms* be loſt in the agent's hands, or the debt become cancelled, the agency is null;) and ſuch being the caſe, it follows that, in the appointment of an agent for the purchaſe of a ſlave, or for making a *Sillim* contract, the property of a debt is veſted in a perſon, by another who is not indebted to him, without his being appointed an agent for the ſeizin of the ſaid debt, which is unlawful; in the ſame manner as if a perſon ſhould purchaſe a thing in exchange for a debt due to him by ſome other than the ſeller; (as if he ſhould ſay to the ſeller, "I have bought this thing from you in exchange for "a debt owing to me by a certain perſon, and which you may take "for the price;")—in which caſe the ſale would be invalid; and ſo alſo in the caſe in queſtion.—In the appointment of an agent for managing a *Sirf* ſale, on the other hand, it would follow that the conſtituent, *before* poſſeſſion, commands the uſe of a thing of which he is not proprietor till *after* poſſeſſion, (for he is not proprietor of the debt till after the receipt of it;) and the application of the thing in queſtion to a *Sirf* ſale, before the ſeizin of it, is null;—in the ſame manner as if a perſon ſhould ſay "give what you owe me to whomſoever you "pleaſe."—It is otherwiſe if the conſtituent ſpecify the *ſeller*; becauſe then the ſeller is his agent for the receipt of the debt, and conſequently takes poſſeſſion of the ſame in virtue of his agency, and then becomes the proprietor of it himſelf. It is otherwiſe, alſo, where a creditor deſires his debtor to beſtow the amount of his debt in *charity*, becauſe here the creditor deſtines his property to God, who is a known and determinate object.—It is to be obſerved that as, in all theſe caſes, the agency (according to *Haneefa*) is not valid, the purchaſe made under it is of force and binding with reſpect to the *agent himſelf*, as being the actual purchaſer:—if, therefore, the ſubject of the ſale ſhould decay or be deſtroyed in his hands, he muſt ſuſtain the loſs: unleſs, however, the conſtituent ſhould previouſly have received ſeizin of it; becauſe, in that caſe, it would become his property, as a ſale of the ſlave is in this inſtance eſtabliſhed between the agent and conſtituent, by a ſort of *reciprocity*.

---

* That is to ſay, it is the ſame thing, whether the agent, at the time of purchaſe, declare that "the *thouſand dirms* he pays for the ſlave are thoſe thouſand which he owes to "his conſtituent," or not.

Where an agent and conſtituent diſagree reſpecting a purchaſe, a judgment muſt be given, according to the *value*;

IF a perſon give another one thouſand *dirms*, and deſire him to purchaſe with it a female ſlave, and the agent accordingly purchaſe a female ſlave, and the parties then diſagree,—the conſtituent aſſerting that he had purchaſed her for five hundred *dirms*, and the agent declaring that he had paid one thouſand for her,—in this caſe the aſſertion of the agent is to be credited, provided the *value* of the ſlave be eſtimated at one thouſand *dirms*; becauſe the price, according to him, being one thouſand *dirms*, in which exact amount he is a truſtee, he therefore, in this caſe, claims a releaſement from his charge of truſtee; whilſt, on the other hand, the conſtituent claims compenſation from him, which he denies.—If, however, the value ſhould be eſtimated only at five hundred *dirms*, then the aſſertion of the conſtituent is to be credited, becauſe the agent departed from his orders in purchaſing a female ſlave for five hundred *dirms*, when the conſtituent deſired one for one thouſand *dirms*; and is therefore reſponſible.—Suppoſing (on the other hand) the conſtituent not to have paid the one thouſand *dirms* to the agent, and all the other circumſtances of the caſe to remain as above mentioned, then alſo, if the value of the female ſlave be only five hundred *dirms*, the aſſertion of the conſtituent muſt be credited, becauſe of the agent's deviation from his orders:—but if the value be one thouſand *dirms*, both parties muſt be required to make oath; (becauſe ſuch is the law in a diſpute about the price in a contract of ſale; and here the conſtituent and the agent ſtand to each other in the relation of buyer and ſeller;)—after which the contract of ſale (which is ſuppoſed to exiſt between the agent and conſtituent) is diſſolved, and the right of property in the ſlave becomes veſted in the *agent*.

or according to the declaration of the *ſeller*.

If a perſon deſire another to purchaſe for him a ſpecific ſlave, without mentioning the price, and the agent accordingly purchaſe the ſaid ſlave, and they then diſagree in regard to the price, (the agent aſſerting that he had paid one thouſand *dirms*, and the conſtituent aſſerting that he had only paid five hundred *dirms*,) in this caſe, provided the ſeller authenticates the declaration of the agent, his aſſertion, corroborated by an oath, muſt be credited.—Some have ſaid that an oath is not to be exacted in this inſtance, ſince the doubt ariſing from the diſagreement is removed by the verification of the ſeller: in oppoſition to the preceding caſe, where the ſeller is ſuppoſed to be abſent.—Others, again, have ſaid that in this caſe alſo an oath is requiſite. *Mohammed* alleges that as, after the receipt of the price, the ſeller is, as it were, a *ſtranger* to both the agent and the conſtituent,—and, even *before* the receipt of the price, is in the relation of a ſtranger to the *conſtituent*,—his aſſertion can have no effect in regard to a diſagreement between the conſtituent and agent; and conſequently, that an oath is requiſite. This is alſo the opinion of *Aboo Manſoor*; and it is the moſt authentic doctrine.

SECT.

Digitized by Google

SECT. II.

Of the Appointment of AGENTS, *by* SLAVES, *for the Purpoſe of purchaſing their own Perſons in their own Behalf*[*].

A ſlave may employ a perſon to purchaſe his freedom from his maſter.

IF a ſlave ſay to a perſon, "purchaſe me, in behalf of myſelf, "from my maſter, for one thouſand *dirms*[†]," (at the ſame time delivering the one thouſand *dirms*,) and the ſaid perſon accordingly purchaſe the ſlave from his maſter, in behalf of the ſlave, he [the ſlave] becomes free; and the right of *Willa* remains with the maſter; becauſe the ſale of the perſon of the ſlave to the ſlave himſelf is here interpreted in its *metaphorical* ſenſe, (that is, the *liberation* of the ſlave,) as the interpretation of it in its *literal* ſenſe, (namely, the exchange of property for property,) is here unattainable: the ſlave's purchaſe of his own perſon, moreover, is in fact an agreement on his part to accept his freedom in exchange for his property; and the agent ſtands merely as a *meſſenger*, becauſe none of the rights of the contract reſt in him:—the caſe is, therefore, the ſame as if the ſlave had purchaſed his own perſon: and as the ſale of the ſlave is, in fact, an emancipation of him on the part of the maſter, he is therefore entitled to the right of *Willa*.—If, however, the agent ſhould not particularly ſay and explain to the maſter that he purchaſed the ſlave *on behalf of the ſlave*; but, on the contrary, ſimply ſay "I have pur-"chaſed a particular ſlave of yours;" in that caſe the ſlave becomes the property of the purchaſer; becauſe theſe words, in their literal ſenſe, are uſed to expreſs an exchange of property for property, which is here practicable, and conſequently followed: in oppoſition to the former ſtatement of the caſe, where the *literal* meaning not being practicable, the *metaphorical* ſenſe was therefore adopted:—and as the *literal* meaning (namely, an exchange of property for property) is here followed, the purchaſer of conſequence becomes the proprietor of the ſlave; and the one thouſand *dirms* given to him by the ſlave for the purchaſe of himſelf are the right of the maſter, as being the ſlave's earnings; and the purchaſer muſt pay him another thouſand dirms for the *price*. In ſhort, in the caſe of an agent for a ſlave purchaſing the ſaid ſlave in his own behalf, it is neceſſary that he particularly explain the circumſtances of the caſe; that is, that he expreſsly ſpecify the purchaſe of the ſlave "*to be made in behalf of the* "*ſlave*,"—for otherwiſe the purchaſe is for *himſelf*, and *not* for the *ſlave*. It is otherwiſe where a perſon, who is not a ſlave, purchaſes, in the capacity of an agent, a ſpecific ſlave; for it is not neceſſary that *he* ſhould ſpecify in whoſe behalf the purchaſe is made, ſince the contract of ſale takes place, whether ſuch an explanation be made or not; and in either caſe the ſeller demands the price from the agent, who is the contracting party. In the caſe in queſtion, on the contrary, the explanation is material; for if it be *not* made, the tranſaction is a *ſale*;—or, if it *be* made, it is an *emancipation*, with a reverſation of the right of *Willa*; in which caſe the price is not demanded from the agent, notwithſtanding he is the contracting party:—it is, moreover, poſſible that the maſter may not be inclined to the emancipation, but may aſſent to the ſale merely with a view to the *exchange*,—in which caſe, alſo, explanation is indiſpenſable.

---

[*] That is, *with a view to their emancipation.*

[†] In other words, "*purchaſe my* FREEDOM *for one thouſand* DIRMS."

A ſlave may act as the agent of another perſon, in purchaſing his own freedom.

If a perſon ſay to a ſlave "purchaſe your own perſon on my be- "half from your maſter;" and the ſlave ſay to his maſter "ſell me, "on account of a particular perſon, for this quantity of *dirms*," and the maſter accordingly agree, in this caſe the ſlave becomes the property of the conſtituent; becauſe a ſlave is capable of becoming an agent for the purchaſe of himſelf, ſince, with regard to the property involved in his perſon, he himſelf is as a ſtranger; and as he is *property*, a contract a contract of ſale operates with reſpect to him, although the ſeller (becauſe of the property being in the hands of the ſlave himſelf) be not entitled to detain him from the conſtituent after the ſale, as a ſatisfaction for the price:—and as the ſlave is capable of agency, it follows that if, in the caſe in queſtion, he refer the contract to his conſtituent, it conſequently holds good with regard to the conſtituent, becauſe of its being in conformity to his orders; but if, inſtead of referring it to his conſtituent, he ſhould refer it to *himſelf*, he then becomes *free*, becauſe the contract is in that caſe an *emancipation*, to which the maſter agrees.

Objection.—The ſlave is, in this caſe, an agent for the purchaſe of a ſpecific thing; but an agent for the purchaſe of a ſpecific thing is not entitled to purchaſe that thing for *himſelf*.

Reply.—Although the ſlave, in this caſe, be an agent for the purchaſe of a ſpecific thing, yet, by purchaſing, he in reality performs an act of a different nature from *purchaſe* *, and that act is therefore allowed to be expedited in his behalf.

—If, alſo, the ſlave ſimply ſay to his maſter "ſell me," without mentioning the particular perſon, he is free; becauſe his ſpeech being *abſolute*, and admitting of two interpretations, is not applied in favour of the *conſtituent*, on account of the doubt which exiſts, and which conſequently determines the tranſaction to be a contract *in behalf of himſelf*.

SECT. III.

Of Agency *for* Sale.

An agent for ſale cannot ſell to his

An agent for purchaſe or ſale is not permitted, according to *Haneefa*, to enter into a contract of purchaſe or ſale with a perſon whoſe evidence

---

* Namely, *emancipation*.

father or *grandfather.*

evidence would not be admitted in his [the agent's] behalf, ſuch as his father or grandfather.—The two diſciples allege that if an agent ſhould ſell a thing to any perſon whatever, ſtanding in that relation to him, (except his *ſlave* or his *Mokâtib*,) for an equivalent to the value of the ſubject of the ſale, it is lawful; becauſe agency is abſolute; and an agent is not liable to ſuſpicion from ſuch a ſale, ſince the property of thoſe relations is diſtinct and ſeparate from his property; and neither party is entitled to derive a benefit from the property of the other. It is otherwiſe where an agent ſells a thing to his own ſlave, becauſe that, in fact, is a ſale to *himſelf*, as the poſſeſſions of a ſlave are the property of his maſter; and the right of a maſter extends to the earnings of his *Mokâtib*, and becomes, in reality, *his* property in the event of the *Mokâtib*'s inability to diſcharge his ranſom.—The arguments of *Haneefa* upon this point are twofold.—FIRST, any tranſaction which begets ſuſpicion muſt be excepted from agency;—and the act of ſale on the part of the agent, to perſons under the above deſcription, does beget ſuſpicion, ſince they are excluded from giving evidence in his behalf.—SECONDLY, a mutual right of uſufruct and advantage ſubſiſts between the agent and ſuch relations*, ſince each is entitled to derive an advantage from the property of the other; the ſale of any thing to *them*, therefore, is in a manner a ſale to *himſelf*.—A ſimilar diſagreement ſubſiſts with reſpect to a contract of *Sirf* or of *hire*, under theſe circumſtances.

He may ſell the article committed to him at whatever rate, and in return for whatever commodity, he thinks fit.

WHOEVER is appointed an agent for the ſale of any thing, may lawfully (according to *Haneefa*) ſell that thing, either for a large or ſmall price, or in exchange for any thing elſe, as well as for *money*.—The two diſciples maintain that it is neither lawful to ſell the thing at a great and obvious diſadvantage, nor for any thing but *money*, for the following reaſons.—FIRST, agency, although abſolute, is yet reſtricted to the common cuſtoms of mankind; becauſe, as all tranſactions

---

* Namely, his *father* and *grandfather*. (See *Imbiſât.*)

(ſuch as purchaſe and ſale, for inſtance) are for the purpoſe of removing or remedying a want, they are therefore reſtricted to the meaſure of that want;—(whence it is that agency for the purchaſe of a *ſtove*, or of *ice*, or of any animal deſtined for *ſacrifice*, is reſtricted to the period in which thoſe things are wanted;)—and the common practice among mankind is to ſell a thing for an adequate value, and for this value (not in any thing elſe, but) in *money*.—SECONDLY, ſale at a *great and evident diſadvantage* is partly a *ſale* and partly a *gift*;—in the ſame manner, alſo, the ſale of goods for other goods (which is termed *Beea Mokáſa*, or barter) is *ſale* in *one* ſhape, and *purchaſe* in *another* ſhape;—neither of theſe, therefore, can be abſolutely termed a *ſale*.—The argument of *Haneefa* is that agency is *abſolute*, and muſt therefore be permitted to operate in an abſolute manner, provided it be not ſubject to ſuſpicion.—The ſale, moreover, of a thing at an evident diſadvantage is a common practice when there is preſſing occaſion for the price; and, in the ſame manner, it is alſo common to ſell goods in exchange for goods, when one of the proprietors loſes all deſire for his own goods.—With reſpect to the example of the ſale of a *ſtove*, or of *ice*, or of an animal deſtined for *ſacrifice*, (as adduced by the two diſciples in ſupport of their opinion,) the doctrine regarding them cannot be admitted, according to the tenets of *Haneefa*, ſince the *contrary* is related as an opinion of his upon thoſe ſubjects.—Beſides, ſale at an evident diſadvantage is, nevertheleſs, wholly a *ſale*, and in no reſpect a *gift*; whence it is that if a perſon were to make a vow, ſaying " by GOD I will not ſell ſuch a thing," and afterwards diſpoſe of it to an evident loſs, he is forſworn.

OBJECTION.—If ſale at an evident diſadvantage be ſtill wholly a *ſale*, it follows that a father or executor may ſell the goods of a minor at a diſadvantage.—How, therefore, does it happen that they are both debarred from doing this?

REPLY.—The reaſon is that their power is founded entirely upon their ſuppoſed regard for the intereſt of the minor; and the tranſaction

in queſtion being of a nature which argues a want of this regard, is conſequently not permitted to them.
—In regard to a ſale of goods for goods, it is either completely a ſale, or completely a purchaſe; and cannot be *partly* a ſale, and *partly* a purchaſe, ſince the properties of ſale exiſt completely in it, as well as the properties of a purchaſe.

An agent may purchaſe a thing at any rate not *greatly* exceeding the value.

An agent for purchaſe may lawfully buy a thing for a price equivalent to its value: and alſo for more than its value, provided the difference be not *very conſiderable*; but it is not lawful for him to purchaſe it at a rate *much beyond* the value, as this gives room for ſuſpicion, ſince it is poſſible that he may have firſt purchaſed it for himſelf; and that afterwards, on perceiving the loſs, he had determined it for his conſtituent. If, however, an agent be employed for the purchaſe of a *ſpecific* thing, and purchaſe it for a price much beyond its value, lawyers have obſerved that the bargain is nevertheleſs made for his conſtituent; ſince an agent for the purchaſe of a *ſpecific* thing, as not being allowed to purchaſe that thing for *himſelf*, is not, of conſequence, liable to any ſuſpicion.—In the ſame manner, alſo, if an agent for marriage ſhould contract a woman in marriage to his conſtituent, engaging for a dower beyond her *Mihr Miſl*, or *proper* dower, it is lawful, according to *Haneefa*; becauſe, in marriage, as the agent muſt neceſſarily refer the contract to his conſtituent, he is, therefore, not liable to ſuſpicion:—but it is otherwiſe with an agent for *purchaſe*, as he may, if he pleaſe, ſettle the contract in an *abſolute* manner without referring it to his conſtituent.—The term *evident diſadvantage*, as here uſed, ſignifies a rate beyond the valuation of appraiſers,—as where, for inſtance, if ſeveral perſons make an appraiſement of a thing, none of their appraiſements equal the price given.—Some have ſaid that this term is uſed in the exchange of goods for goods, where the difference is as *ten* to *ten and an half*; and in cattle, where it is as *ten* to *eleven*; and in immoveable property, where it is as *ten* to *twelve*.

The reaſon of theſe proportions is that the ſale of the *firſt* kind is common; of the *ſecond* kind the ſale is in a mean between frequency and rarity; and of the *third*, it is rare:—and the diſadvantage increaſes in proportion to the rarity of the tranſaction.

An agent for the ſale of a *ſlave* may lawfully ſell any *part* or *portion* of him.

IF a perſon, being appointed an agent for the ſale of a ſlave, ſhould ſell the *half* of him, ſuch ſale is valid, according to *Haneefa*; becauſe the agency is in this inſtance abſolute, and does not reſtrict the ſale either to *one* or *more* contracts; and as it would have been valid, under ſuch circumſtances, if he had ſold him *wholly* for *half* of the price, it follows that it is valid where he ſells the *half* for half of the price, *a fortiori*.—The two diſciples allege that the ſale of the *half* of the ſlave is not valid, as not being agreeable to cuſtom, and becauſe it involves the vexation of participation in the property:—the ſale, therefore, is invalid; unleſs the ſale of the remainder alſo be completed previous to the diſagreement of the parties, and their appeal to the *Kâzee*,—in which caſe it is valid, ſince the ſale of one half may be neceſſary to facilitate the ſale of the other half;—(as where, for inſtance, there is no purchaſer for the *whole*, when it would be incumbent on the agent to make partial ſales:)—if, therefore, he ſell the remaining half prior to the delivery of the ſubject of the firſt ſale, it is evident that the ſale of the *firſt* half was made with a view to facilitate the ſale of the whole, and is conſequently valid: but if, on the contrary, he ſhould *not* ſell the remaining half, it is evident that the *partial* ſale was not adopted as a mean of facilitating the ſale of the whole, and is conſequently invalid.—This diſtinction, according to the two diſciples, proceeds upon a favourable conſtruction of the law.

An agent for the purchaſe of a ſlave may purchaſe him either *wholly* or in *ſhares*.

IF a perſon be appointed an agent for the purchaſe of a ſlave, and purchaſe *one half* of him, the purchaſe remains ſuſpended; (that is to ſay, it is binding on the conſtituent in caſe the agent afterwards purchaſe the *other* half;) becauſe the purchaſe of a *part* may be the means of the purchaſe of the *whole*; (as where the ſlave, for inſtance, has become the property of a *number* of perſons, by inheritance, in which caſe there is a neceſſity for the agent purchaſing *one* ſhare from *one* heir, *another* from *another*, and ſo forth;)—and where the agent purchaſes the remainder of the ſlave before his conſtituent rejects the *firſt* purchaſe, it is evident that he purchaſed *part* merely with a view to facilitate the purchaſe of the *whole*:—the contract of purchaſe is therefore binding upon the conſtituent, and effectual with reſpect to him.—This is univerſally admitted.—According to *Haneefa*, there is a difference between this and the preceding example; for two reaſons. First, in the *purchaſe* of a half of the ſlave there exiſts a ſuſpicion, as it is poſſible that the agent may have made the purchaſe in his own behalf, and becoming afterwards ſenſible of the defect ariſing from participated property, may have then determined it for his employer: a ſuſpicion which does not exiſt in the caſe of the *ſale* of the half:—Secondly, the order of a conſtituent to *ſell* any thing is an order relative to his own property, and is conſequently valid; and ſuch being the caſe, reſtriction or latitude muſt be attended to.—The order of a conſtituent to *purchaſe* any thing, on the contrary, is an order relative to the property of *another*, and is conſequently invalid; and ſuch being the caſe, reſtriction or latitude are not objects of attention.

An agent to whom an article of ſale is returned, by a decree of the *Kâzee*, in conſequence of an *original* defect, may return it to his conſtituent, who muſt receive it back without any ſuit.

If a perſon deſire another to ſell his ſlave, and the other ſell the ſlave accordingly, and either take poſſeſſion of the price or not, and the purchaſer, in conſequence of a defect of ſuch a nature as could not have been ſupervenient, (ſuch, for inſtance, as an *additional finger*,) return him upon the agent's hands, by a decree of the *Kâzee*, founded either upon evidence, or on the refuſal of the agent to take an oath, or on his expreſs acknowlegment,—in this caſe the agent may return him to the conſtituent; becauſe the *Kâzee*, in this inſtance, has expreſsly determined the defect to have had exiſtence during the poſſeſſion of the ſeller, on which account he decrees the return; and hence his decree is not, in fact, founded on any of the above circumſtances,

ſtances, namely, *evidence*, *refuſal to take an oath*, or *acknowledgment*.

OBJECTION.—What occaſion, therefore, for the exhibition of theſe proofs? and why is any mention made of them in this caſe?

REPLY.—To remove the doubt thus ſtated, the author of this work obſerves, that the *Kâzee* knows with certainty that a defect, ſuch as above deſcribed, could not happen in the courſe of a month; but not knowing when the ſale took place, there is therefore a neceſſity for theſe proofs, in order to aſcertain the date of the ſale, and that the *Kâzee* may be enabled clearly to determine that the ſaid defect had not happened *ſince* the ſale, but had exiſted *prior* to it.—The defect may alſo be of ſuch a nature as required the inſpection of women or phyſicians:—but although the opinion of women or phyſicians be ſufficient to prevent contention, yet it is not a ſufficient ground for a decree of reſtitution: there is, therefore, a neceſſity for the proofs aforeſaid;—unleſs, indeed, the *Kâzee* himſelf witneſs the ſale and perceive the defect, in which caſe there is no neceſſity whatever for thoſe proofs.—The return to the agent is, in fact, a return to the *conſtituent*; and hence the agent is under no neceſſity of entering a ſuit againſt his conſtituent to enforce his admiſſion of the return.

And ſo alſo, where the defect is *ſupervenient*; provided the *Kâzee*'s decree be not founded on the agent's *acknowledgement*;

THE law is ſimilar where the purchaſer returns the ſlave to the agent, in virtue of a decree of the *Kâzee*, founded either on evidence or refuſal to take an oath, on account of a defect of ſuch a nature as may have taken place *ſubſequent* to the ſale; becauſe *evidence* is abſolute proof: and, as to the *agent*, he is under a neceſſity of declining to ſwear, as he had not always the poſſeſſion of the ſlave, having received him only after the appointment of agency, whence it is poſſible that he is unacquainted with the defect;—when, therefore, the purchaſer returns the ſlave on account of the agent's refuſal to take an oath, the ſale affects the conſtituent, and he muſt take him back.—If, on the other hand, the purchaſer return him to the agent, in conſequence of a decree founded on his *acknowledgment*, the ſale is abſolute upon the agent, as acknowledgment is a *weak proof*, (that is, does not effect any other than the acknowledger;) and the agent does not act from neceſſity, in this caſe, as he had it in his power either to have remained ſilent, or to have refuſed taking an oath.—The agent, however, may afterwards litigate the matter with his conſtituent, and oblige him to take back the ſlave on his eſtabliſhing proof by evidence, or on the conſtituent's refuſal to take an oath.—It is otherwiſe where the purchaſer returns the ſlave to the agent, on his acknowledgment, *without* a decree, for in this caſe he has no grounds for a ſuit againſt the conſtituent to compel him to retake the ſlave; becauſe this return is a ſale *de novo* with reſpect to a *third* perſon, who is neither the *purchaſer* nor *ſeller*; and the *conſtituent* muſt be this third perſon, ſince none but the agent can be conſidered as the *ſeller*.—The agent, therefore, in receiving back the ſlave from the purchaſer to whom he had ſold him, does, as it were, *repurchaſe* him; and hence he is debarred from returning him to the conſtituent, or litigating the matter with him.—A return of the ſubject of the ſale, on the other hand, *in virtue of a decree of the* KÂZEE *founded on an acknowledgment of the ſeller*, is an *annulment of the contract of ſale*, and not a ſale *de novo*; becauſe although the authority of the *Kâzee* be *general*, yet acknowledgment is but *weak proof*.—In this caſe, therefore, as the contract of ſale is annulled, the agent is entitled to ſue the conſtituent, in order to compel him to receive back the ſlave: but as his acknowledgment is inſufficient proof, the conſtituent cannot be compelled to receive back the ſlave without proof by evidence *.

in which caſe the conſtituent is not obliged to receive it back without a *ſuit*.

IF, on the other hand, the defect on account of which the purchaſer has returned the ſlave be of ſuch a nature as cannot be *ſupervenient*, (ſuch as a *ſuperfluous finger*, for inſtance,) and the return be made to the agent in conſequence of his acknowledgment of the defect,

If the defect be *original*, the conſtituent muſt receive back the article

---

* Meaning, *proof to the exiſtence of the defect*.

Digitized by Google

feſt; without any decree of the *Kâzee*,—in this caſe, according to one tradition, the conſtituent is obliged, without the neceſſity of eſtabliſhing a ſuit againſt him, to receive back the ſlave; as the return is of a determinate nature, and therefore the parties did of themſelves what the *Kâzee* would have done.—According to many traditions, however, the agent has here no right to ſue the conſtituent, in order to make him receive back the ſlave, for the reaſon already ſtated, that "the "purchaſer's returning the article to the agent, in conſequence of his "acknowledgment, is a ſale *de novo*, with reſpect to others than "the parties themſelves; and the conſtituent is not a party."—In regard to the aſſertion contained in the firſt tradition, that "the re-"turn of the ſubject of the ſale was a thing of a determinate nature," it is not admitted; becauſe the right of the purchaſer, at firſt, was that the ſubject of the ſale ſhould be in a complete and perfect ſtate; and failing of this, his right then relates to a return of the ſubject; and afterwards it ſhifts, and relates to a reſtitution of the exact quantity of loſs he may have ſuſtained in the price.—In this caſe, therefore, the return of the ſubject of the ſale is not a thing of a *determinate* nature.

from his agent without litigation, whether it be returned by the purchaſer in conſequence of his [the agent's] acknowledgement, or not.

IF the conſtituent and agent diſagree, the one aſſerting that "he had "ordered the other to ſell his ſlave in exchange for *ready money*, and "that he had nevertheleſs ſold him *on credit*,"—and the other, that "he "[the conſtituent] had merely deſired him to *ſell* him, and that he had "ſaid nothing more,"—in this caſe the aſſertion of the *conſtituent* muſt be credited; becauſe he is the perſon from whom the order iſſued; and no argument exiſts of this order being *abſolut*, agency being in its original nature *relative* and *reſtricted*; whence it is that if one perſon ſhould ſay to another, "I have made you agent with regard to my "property;" the agent would not be permitted to do as he pleaſed with regard to the property, but would be reſtricted entirely to the preſervation of it.—If, on the other hand, a diſagreement ſimilar to that

A conſtituent muſt be credited with reſpect to his *inſtructions*.

that in queſtion ſhould take place between a *manager* * and his *principal*, the aſſertion of the *manager* muſt be credited; becauſe *Mozâribat* is in its original nature *general* and *abſolute*; whence it is that if a perſon ſhould ſay to another "I have delivered this property to you by "way of *Mozâribat*," or, "take this property by way of *Mozâri*-"*bat*," the other might lawfully perform acts of *Mozâribat* with that property †.—In *Mozâribat*, therefore, an argument exiſts of its being abſolute. It would be otherwiſe, indeed, if the principal ſhould declare that he had given the property to be uſed by *one particular mode* of *Mozâribat*, and the manager ſhould declare that he had ſtipulated *another* mode: for, in ſuch a caſe, the aſſertion of the principal would be credited; becauſe the parties are both agreed, in this inſtance, that the *Mozâribat* was *reſtricted* and not *abſolute*; and *Mozâribat*, whenever it ceaſes to be abſolute and is determined to be reſtricted, reſolves itſelf into a mere *agency*.—It is to be obſerved that an unreſtricted commiſſion to ſell any thing may relate either to *ready money*,—or to *credit*, whether for a *long* or a *ſhort* period, according to *Haneefa*. The two diſciples maintain that the period of credit muſt be confined to what is *cuſtomary*.—The principle on which this proceeds has been already explained.

An agent for ſale is not reſponſible for conſequences.

If a perſon order another to ſell his ſlave, and the other, having accordingly ſold him, ſhould take a pledge for the price, which pledge is afterwards loſt or deſtroyed in his poſſeſſion,—or, if he ſhould take ſecurity from the purchaſer for the payment of the price, and both the ſurety and the purchaſer die inſolvent, or diſappear, ſo as to leave it unknown whither they are gone—in neither of theſe caſes is the agent reſponſible: for *he* is the original with reſpect to the rights of the contract of ſale; and ſeizin of the price is one of theſe rights;—and as the taking of ſecurity was with a view to add to his certainty, and the taking of a pledge was in the nature of a bond to anſwer the payment of the price, it follows that he was competent to theſe acts.—It is otherwiſe with reſpect to an agent for the receipt of *debt*; for he acts by way of *ſubſtitution*; that is to ſay, the creditor has ſubſtituted him to receive the debt for him, but has not appointed him to take ſecurity or a pledge in oppoſition to the debt; whereas an *agent for purchaſe*, on the contrary, receives the price in virtue of his being a principal, and a party in the contract, and therefore the conſtituent cannot prevent him from performing theſe acts.

---

* Arab. *Mozârib.*—Meaning, an *agent for trade*. It is particularly treated of under the head of *Mozâribat*.

† That is to ſay, might employ it in trade according to his own diſcretion.

SECT. IV.

MISCELLANEOUS CASES.

Joint agents cannot act ſeparately without a mutual concurrence;

IF a perſon appoint *two* agents, it is not permitted to either of them to act in any matter relative to their agency, without the concurrence of the other.—This is the law with reſpect to all tranſactions which require thought and judgment, (ſuch as *ſale*, *Khoola*, and ſo forth,) becauſe the conſtituent, in thoſe tranſactions, may have a confidence in the joint judgment of *both* the perſons in queſtion, although not in the ſingle judgment of either of them.

OBJECTION.—Where the price is fixed, there can be no need for thought and judgment; and therefore, in that caſe, the act of one of the parties ought to be valid: whereas it is held to be otherwiſe.

REPLY.—Although the price be fixed, yet there may be occaſion for judgment to increaſe it, and alſo to make a proper choice of a purchaſer.

The

except in the management of a ſuit,

The act of one of two agents without the concurrence of the other is not valid excepting in ſome particular caſes:—as where, for inſtance, a perſon appoints two agents for the management of his ſuit, in which caſe either of theſe may lawfully act without the other; becauſe their *joint* action is impracticable, as it would only create a noiſe and confuſion in the aſſembly of the *Kâzee.* Their judgment, moreover, is required to be exerted *previous* to the aſſembly of the *Kâzee:* in other words, they ought previouſly to conſult with each other, and then one of them ought to attend the meeting of the *Kâzee* to manage the replies and interrogations; which may be more effectually executed by *one* than *two*, ſince, in the latter caſe, much noiſe and confuſion would inſue.—In the ſame manner it is lawful for one of two agents to act ſingly in caſe of their having been jointly appointed agents by another to execute a *divorce* in his behalf without a compenſation *;—or to emancipate his ſlave without a conſideration;—or to reſtore a depoſit to the owner of it;—or, laſtly, to diſcharge a debt due by him. The reaſon of this is, that in theſe caſes there is no neceſſity for conſultation and judgment, ſince in all of them *explanation* merely is required; and the ſpeech of *one* man, in this reſpect, is equal to that of *two.*—It were otherwiſe if the conſtituent had ſaid to the two agents, "divorce a particular wife of mine *if you pleaſe*," or "the buſineſs "of ſuch a wife is in your hands,"—for in this caſe it would not be permitted to one of the two agents to divorce the ſaid wife; becauſe the conſtituent has committed the divorce to the thought and judgment of *both*; and alſo, becauſe he has ſuſpended it upon a circumſtance relative to both,—namely, their *pleaſure*,—and as he has connected it with a circumſtance relative to *both*, it becomes analogous to where a perſon connects the divorce with the arrival of two perſons at a particular houſe; in which caſe the execution of it reſts on the arrival of *both* theſe perſons at the ſaid houſe; and ſo alſo, in the caſe in queſtion, it depends on the joint wiſh of both the agents.

gratuitous divorce or manumiſſion, the reſtoration of a depoſit, or the diſcharge of a debt.

---

* In oppoſition to *Khoola*, or *divorce for a compenſation.*

An agent cannot appoint a *ſecondary* agent;

AN agent is not permitted to appoint another perſon an agent to execute a commiſſion to which he himſelf was appointed, as the conſtituent, in committing the tranſaction to him, did not empower him to appoint an agent for the execution of it.—The reaſon of this is that although the conſtituent be ſatisfied with the judgment of his own agent, yet it does not follow that he is ſatisfied with the judgment of *another* perſon, ſince mankind in this reſpect are different.—It is, therefore, not lawful for an agent to appoint an agent, unleſs with the conſent of his conſtituent; or unleſs the conſtituent ſhould have deſired the agent to act according to his wiſdom and judgment,—in the firſt of which caſes the conſent is expreſs; and in the ſecond, the conſtituent commits his buſineſs, in an abſolute manner, to the agent's diſcretion.—As, in this caſe, however, the agency of the ſecondary agent is valid, he is the agent of the primary conſtituent; and hence the primary agent has not the power of diſmiſſing him, nor would his power of agency ceaſe in caſe of the *death* of the primary agent. The agencies of both, however, would terminate in the event of the death of the conſtituent. A caſe which exemplifies this has been already ſet forth in treating of the *duties of the* KÂZEE.

unleſs by conſent of his conſtituent; or, unleſs his powers be *diſcretionary*.

Contracts entered into by a *ſecondary* agent in the preſence of the *primary* are, however, valid:

IF an agent appoint an agent without the conſent of his conſtituent, and the ſecondary agent conclude a contract of ſale in the preſence of the primary agent, the contract is in that caſe valid, becauſe it has had the advantage of the wiſdom and judgment of the primary agent, which is the very object of the conſtituent.—A diſagreement, however, ſubſiſts with reſpect to the *rights* of this contract.—Some have ſaid that they appertain to the *primary* agent, as the conſtituent has not acquieſced in any other's undertaking the fulfilment of the contract; whilſt others maintain that they relate to the *ſecondary* agent, as being the actual framer of the contract. If, on the other hand, the ſecondary agent conclude a contract in the *abſence* of the primary agent, it is not valid, as it has not the advantage of the wiſdom and judgment of the primary agent.—If, however, the

and they are alſo valid,

although made in his *abſence*, provided he afterwards conſent to them,—(and the ſame of a contract engaged in by any *ſtranger*;) or that (in a caſe of *purchaſe* or *ſale*) the conſtituent had previouſly fixed the *rate*.

Joint agents muſt act together, although the conſtituent have fixed the rate.

the primary agent, having received information of the contract, ſhould expreſs his acquieſcence in it, it is then valid: and ſo alſo, a contract becomes valid which, having been concluded by ſome other than the agent, afterwards receives his aſſent on his hearing of it, ſince it has thus the benefit of his judgment.—If, alſo, the primary agent firſt fix a price to be obſerved by the ſecondary agent, and the ſecondary agent then enter into a contract of purchaſe or ſale, ſuch contract is valid; becauſe the exertion of the primary agent's judgment is evidently required only for the purpoſe of *fixing the price*, which has been already done.—It is otherwiſe, however, where the conſtituent appoints *two* agents, and fixes the price himſelf: for, in this caſe, notwithſtanding the conſtituent's ſettlement of the price, the concluſion of the contract by one agent, although at the fixed price, would not be valid; becauſe where the conſtituent appoints two agents, notwithſtanding his having fixed the price, it is evident that his object is a union of the judgments of *both*, in order either to increaſe the *quantity* of the goods (if they be agents for *purchaſe*,) or to make a proper choice of *purchaſers*, (in caſe they be agents for *ſale*,) as was before ſtated: whereas, if the conſtituent ſhould *not* fix the price himſelf, but reſign the management of the contract to *one* perſon, (being his immediate agent, and not the agent of his agent,) in that caſe his object is to obtain the judgment of the agent in the grand point of the contract, namely, the *amount of the price*.

A *Mokâtib*, a *ſlave*, or a *Zimmee* cannot act on behalf of an infant daughter being a *Muſlimá*:

If a *Mokátib*, an abſolute ſlave, or a *Zimmee*, contract a marriage in behalf of a minor daughter who is free and a *Muſlimá*,—or make a purchaſe or ſale in behalf of a minor child under ſuch deſcription,—it is unlawful; (and the ſame of every other tranſaction which they perform relative to the *property* of ſuch a child;) as a ſlave or an infidel are not endowed with authority, becauſe of their ſlavery and infidelity; for as a ſlave has not the power to marry in *his own* behalf, it is evident that he cannot have that power with reſpect to others; and an infidel, on the other hand, has no power over *Muſſulmans*; inſomuch that his evidence with reſpect to them is not admitted.—Beſides, the power in theſe caſes, (that is, the right of acting with regard to the property of an infant,) is granted with a view to the infant's advantage, and out of regard to his intereſt; and hence it is neceſſary that this power be conſigned to a perſon competent and affectionate, in order that the end may be anſwered: now *competency* is deſtroyed by *ſlavery*; and the exiſtence of affection to a *Muſſulman* is incompatible with *infidelity*: a right of action, therefore, with regard to the property of the infant in queſtion, cannot be committed to a *ſlave* or an *infidel*.—*Haneefa*, *Aboo Yooſaf*, and *Mohammed*, are of opinion that an apoſtate who ſuffers death on account of his apoſtacy, and an infidel *alien*, are, with reſpect to an infant daughter who is a *Muſſlimá*, in the ſame predicament with a *Zimmee*;—(that is to ſay, neither of theſe has a right to perform any act with regard to her property, ſuch as purchaſe or ſale, or the contracting of her in marriage with another;)—becauſe an infidel *alien* is endowed with *ſtill leſs* power over a *Muſſulman* than a *Zimmee*: and with reſpect to an apoſtate, although (in the opinion of the two diſciples) he poſſeſſes power with regard to his *own* property, yet his power over his children, or over their property, remains ſuſpended upon his repentance and return to the faith, according to *all* our doctors; becauſe a power of action, with reſpect to the property of an infant, is founded on the infant's advantage, and a regard for his intereſt; and an apoſtate's regard for the intereſt of his child (being a *Muſſulman*) muſt entirely depend on his return to the faith; now this is a circumſtance of doubt: if he be put to death in his apoſtacy, it is then evident that he has no power of action, and all ſuch acts are conſequently null:—if, on the other hand, he return to the faith, it becomes the ſame as if he had been always a *Muſſulman*, and his acts of the nature in queſtion are therefore valid.

and the ſame of an *apoſtate*, or *infidel alien*.

Digitized by Google

CHAP. III.

Of the Appointment of Agents for *Litigation* and for *Seizin*.—(*Khaſoomat*, or *Litigation*, means a Converſation carried on between two Perſons in the way of *Contention* and *Diſagreement*.)

Agency for *litigation* implies and involves an agency for *ſeizin*:

If a perſon appoint another his agent to contend for ſomething in his behalf, the perſon ſo appointed is held, in the opinion of all our doctors, to be alſo an agent for the *ſeizin* of that thing, whether it be *debt* or *ſubſtance*.—*Ziffer* alleges that he cannot be conſidered as an agent for *ſeizin*, ſince his conſtituent acquieſces only in his agency for *litigation* in his behalf.—Litigation, moreover, is one concern, and ſeizin is another concern; and the conſtituent expreſſes his acquieſcence in the *litigation*, but not in the *ſeizin*. The argument of our doctors is that when a perſon becomes empowered with reſpect to any thing, he neceſſarily becomes empowered with reſpect to the *completion* of that thing; and the end and completion of a *contention* for any thing is the *ſeizin* of that thing.—In the preſent age decrees paſs according to the opinion of *Ziffer*; becauſe of the apparent want of probity of agents in this age; and alſo, becauſe many men may be truſt-worthy in regard to the management of a contention, and not with reſpect to the ſeizin of property.—It is to be obſerved that an agent for litigation is analogous to an agent for exacting the payment of a debt; becauſe he alſo is competent to the ſeizin, in as much as the ſeizin of a debt is in effect included in the ſuing for the payment of it. The common acceptation of the word, however, is different, becauſe from *Takáza* [exacting by means of a ſuit at law] *ſeizin* is not generally underſtood; and the

(but decrees are paſſed on the contrary principle in in the preſent times.)

Digitized by Google

the common acceptation muſt be preferred to the *virtual* meaning.—According to the decrees in this age, therefore, he is not an agent for *ſeizin*.

IF there be *two* agents for litigation, they are in that caſe required jointly to receive ſeizin of the thing which is the object of contention; becauſe the conſtituent has expreſſed his acquieſcence in the probity of them both *jointly*, and not in that of *either* of them *ſingly*; and as the conjunction of both, with reſpect to ſeizin, is practicable, they muſt therefore take poſſeſſion together.—It is otherwiſe with reſpect to the mere *litigation*, becauſe their joint action is in that particular impracticable, as has been already demonſtrated.

An agent empowered to take poſſeſſion of a debt is alſo an agent for *litigation*.

WHOEVER is an agent in behalf of another for the *ſeizin* of a debt due to him, is alſo an agent for *litigation* in behalf of that perſon, according to *Haneefa*; (whence it is that if the other party bring evidence to prove that the conſtituent had received payment of his debt, or had given the creditor an acquittal, ſuch evidence, in the opinion of *Haneefa*, would be admitted.)—The two diſciples maintain that the agent in queſtion is not an agent for *litigation*; (and ſuch alſo is reported, by *Haſan*, from *Haneefa*;) becauſe ſeizin and litigation are different things; and it does not follow that a perſon, from being truſtworthy with regard to property, ſhould alſo be ſkilled in the buſineſs of litigation. The acquieſcence of the conſtituent, therefore, in the agency for *ſeizin*, does not neceſſarily involve his acquieſcence in the agency for *litigation*.—The argument of *Haneefa* is that an agent for the ſeizin of a debt is an agent for the ſubſtantiation of property; (that is, he is an agent for the receipt of a conſideration for a debt which is the right of the creditor, in order that ſuch conſideration may become the property of the creditor; becauſe it is impoſſible to receive the *actual ſubſtance* of the debt; and hence whatever he receives in the diſcharge of the debt becomes the property of the creditor; and as this is a *compenſation*, or *contract of exchange*, the agent is conſequently the *principal*, he being ſo with reſpect to all ſuch rights as a contract of exchange require;)—and ſuch being the caſe, he is of courſe the plaintiff, and is entitled to carry on the ſuit in the ſame manner as an agent for litigating a right of pre-emption, or for *purchaſe*. He moſt reſembles, however, an agent for litigating a right of pre-emption; becauſe an agent for the receipt of a debt, inſtitutes his ſuit prior to the ſeizin of it, in the ſame manner as an agent for maintaining a right of pre-emption inſtitutes his ſuit prior to his taking the right; whereas an agent for purchaſe cannot inſtitute a ſuit, until he has completed the contract of purchaſe.

A commiſſion to take poſſeſſion of ſubſtance does not involve a commiſſion to *litigate*.

An agent for the ſeizin of ſubſtance * is not an agent for litigation, according to all our doctors; becauſe he is a mere *truſtee*; and alſo, becauſe the ſeizin of ſubſtance is not an exchange: he is, therefore, conſidered merely as a *meſſenger*.—Hence, if a perſon commiſſion another to take poſſeſſion of his ſlave, and the perſon in whoſe poſſeſſion the ſlave is ſhould prove by witneſſes that the conſtituent had *ſold* the ſlave to him, the *Kâzee* muſt not decree the ſale againſt the agent, until the conſtituent himſelf appear.—This proceeds upon a favourable conſtruction.—Analogy would ſuggeſt that the ſlave ſhould be delivered to the agent, becauſe, as the proof has been exhibited againſt a perſon who is not the adverſary, (ſince the *agent* is not the adverſary,) it cannot therefore be admitted. The reaſon for a more favourable conſtruction, in this particular, is that the evidence goes to two points;—FIRST, to prove the ſale on the part of the conſtituent, and the conſequent deſtruction of his property;—SECONDLY, to prove that the ſaid agent has no right to make ſeizin of the ſaid ſlave.—Now, although the evidence on the *firſt* point be not againſt a regular adverſary, yet in regard to the *ſecond* point it *is* againſt a regular adverſary;

---

* Arab. *Ain*;—meaning ſome *actually exiſtant* property, (ſuch, for inſtance, as an article borrowed under an *arreeat* loan,) in oppoſition to a debt in *money*, or to an article compenſable by an equal quantity of the ſame article (ſuch as *grain*, and the like.)

verſary; (for the *agent* is the adverſary on the *ſecond* point:)—the evidence, therefore, is admitted with reſpect to the *ſecond* point, but not with reſpect to the *firſt* point; whence, if the conſtituent were himſelf to appear, it would be neceſſary to exhibit the evidence *de novo*, to prove that he had ſold the ſlave.—It is therefore the ſame as if evidence had been adduced to prove that the conſtituent had *diſmiſſed* his agent, for that would be admitted ſo far as to prevent the agent from the ſeizin; and ſo alſo in the caſe in queſtion.—The effect is the ſame in caſes of *emancipation*, *divorce*, and the like.—Thus, if a perſon commiſſion another to bring his wife from her preſent place of reſidence,—or to bring his male or female ſlave,—and the agent having arrived at the place of their reſidence, the wife ſhould prove, by witneſſes, that her huſband had divorced her,—or the ſlave prove, by witneſſes, that he or ſhe had been emancipated,—ſuch evidence muſt be admitted, ſo far as to prevent the agent from carrying them away until the conſtituent ſhall himſelf appear,—but not with reſpect to the *divorce*, or the *emancipation*.

IF an agent for litigation make an acknowledgment, before the *Kâzee*, of ſomething affecting his conſtituent, ſuch acknowledgment is valid with reſpect to the conſtituent. If, however, he ſhould make the acknowledgment before any *other* than the *Kâzee*, it is not valid, (according to *Haneefa* and *Mohammed*, arguing on a favourable conſtruction of the law;)—but the agent, in conſequence of making ſuch acknowledgment before another than the *Kâzee*, is diſmiſſed from his appointment; and therefore, if he ſhould afterwards claim his agency, and bring witneſſes to prove his acknowledgment, it would not be admitted.—*Aboo Yooſaf* alleges that an acknowledgment made before any other than the *Kâzee* is likewiſe valid with regard to the conſtituent. What is here ſaid proceeds upon a favourable conſtruction.—*Ziffer* and *Shafeï* maintain that the acknowledgment is not in either caſe valid with reſpect to the conſtituent: and this (which was the firſt opinion of *Aboo Yooſaf* on the ſubject) is conformable to analogy; becauſe the agent

An agent for litigation is empowered to make *conceſſions* on behalf of his conſtituent.

agent was directed to *litigate*; and by *litigation* is underſtood *contention*, ſince this is an eſſential property of litigation: now *acknowledgment* is the *reverſe* of *contention*; and a direction to perform any act cannot extend to the *reverſe* of that act: on which principle it is that (as contention is neceſſary to the exiſtence of *litigation*) an agent for litigation is not competent to the acts of compoſition or exemption *;—and alſo, that a commiſſion of agency is valid, where the agent's acknowledgment is expreſsly excepted from it, for if acknowledgment be comprehended under litigation, the exception of it would be invalid, in the ſame manner as the exception of the *denial* of the agent †.—A ſimilar diſagreement alſo ſubſiſts with reſpect to the caſe of a perſon appointing another his agent to give, in an abſolute manner, an anſwer in his behalf: for this kind of agency is reſtricted to an anſwer that relates to litigation; becauſe ſuch is the common practice; and hence an agent to give an anſwer in an *abſolute* manner is, in fact, an agent for *contention*.—The reaſon for a more favourable conſtruction of the law, in this particular, is that agency for litigation is indiſputably valid; and the validity of it extends to every point in which the conſtituent is competent. Now the conſtituent is in an abſolute manner competent with reſpect to an anſwer, whether it relate to *denial* or *acknowledgment*; for his power is not confined and determined to *one* of theſe only. The agent, therefore, is alſo competent to either of theſe. Simple *litigation* ‡, moreover, figuratively ſignifies *general reply*; and as there is always an affinity between the *figurative* and the *literal* ſenſe of a term, (as will be hereafter demonſtrated,) the term muſt, in the preſent inſtance, be received in its figurative ſenſe, ſo as to render the agency indiſputably valid: for if the term be adopted in its *literal* ſenſe, (namely, *contention*,) it would follow that the appointment is a commiſſion to *quarrel* and *contend*; and *quarrelling* and *contention* are prohibited; and the appointment of an agent with reſpect to a *prohibited* thing is forbidden. It is therefore indiſpenſible that the term be taken in its figurative ſenſe, (ſo as to render the agency valid,) as this is moſt becoming the *Muſſulman* character.

---

* In other words, of agreeing to a compoſition, or giving a diſcharge, for a debt.

† "*In the ſame manner as the exception of the denial of the agent*:"—that is, in the ſame manner as if the agent's power of *denying* and *rejoining*, &c. were expreſsly excepted from his commiſſion.

‡ Arab. *Khaſoomat.*—The reaſoning in this paſſage turns entirely upon the primitive ſenſe and generally accepted meaning of the term.

Caſe of an appointment of agency with an *exception* of acknowledgment.

IF a perſon appoint an agent for litigation, and except his acknowledgment, it is recorded from *Aboo Yooſaf* that the appointment is invalid, ſince after the exception of the acknowledgment there remains only the *denial*; and as the *conſtituent* is not empowered with reſpect to *denial* only, except where he knows the claim of the adverſary to be unjuſt, he cannot limit the power of the agent to *denial* only.—It is recorded from *Mohammed*, (on the other hand,) that this is valid; for the exception of acknowledgment by the conſtituent clearly indicates that he himſelf is empowered only with reſpect to *denial*, becauſe of his knowing the falſity of his adverſary's plea.—If, however, he ſhould have expreſſed himſelf generally, the commiſſion muſt be interpreted to convey a power of *general reply*, which is becoming the condition of *Muſſulmans*.—It is alſo related of *Mohammed*, that he made a diſtinction between the plaintiff and defendant, obſerving that if a *defendant* ſhould appoint an agent for litigation, and ſhould except his acknowledgment, it is invalid; becauſe a defendant is compelled to make an acknowledgment when put to his oath, and therefore has not the power to eſtabliſh agency for a purpoſe prejudicial to the plaintiff, that is, for *denial*, as to this he himſelf is not competent.—The plaintiff, on the contrary, is at liberty either to acknowledge or deny, as he pleaſes; and hence he is entitled to appoint an agent for one of theſe purpoſes, and to except the other.—*Aboo Yooſaf* argues that an agent is the ſubſtitute of his conſtituent; and as the acknowledgment of a conſtituent is not limited to the court of the *Kázee*, ſo neither ought that of his *ſubſtitute* to be ſo limited.—*Ha-*

Digitized by Google

neefa and *Mohammed*, on the other hand, argue that agency for litigation extends to a reply, which is termed *litigation* either in its *literal* or *metaphorical* ſenſe.—Now an acknowledgment in the aſſembly of the *Kázee* is metaphorically termed *litigation*, either becauſe it is oppoſed to the litigation that has iſſued, or becauſe the litigation is the cauſe of the acknowledgment; the acknowledgment, therefore, is limited to the aſſembly of the *Kázee*.—If, on the other hand, it be proved, by evidence, that ſuch an agent had made an acknowledgment *elſewhere* than in the aſſembly of the *Kázee*, his agency determines: and conſequently if he ſhould make a claim with reſpect to the point concerning which he had before made acknowledgment, and ſhould adduce evidence to prove it, his claim would not be admitted, nor would the object of it be yielded to him, becauſe of the prevarication of which he has been guilty. The agent, in this inſtance, therefore, reſembles a father or an executor, who makes an acknowledgment prejudicial to the infant under his charge in the aſſembly of the *Kázee*, which is of no effect; whence if they ſhould afterwards prefer a claim to the object of it, and adduce evidence to prove their right, it would not be admitted, nor would the article in diſpute be given to them.

Agency for the receipt of a debt, committed to the *ſurety* for the debt, is invalid.

If a perſon be ſurety for property in behalf of a debtor, and the creditor appoint the ſaid ſurety his agent for the receipt of the debt, ſuch agency is abſolutely invalid, for two reaſons.—First, the buſineſs of an agent is *to act in behalf of another*; and if the agency of the ſurety were ſuppoſed to be valid, it would neceſſarily follow that he acts as agent in behalf of his *own perſon*, in order to exempt himſelf from reſponſibility; and thus one of the eſſentials of agency (namely, *action in behalf of another*) would be deſtroyed.—Secondly, if the agency be valid, it neceſſarily follows that in caſe the agent were to ſay "he had received the debt," his aſſertion is credited, (ſince an agent is a truſtee*:) and this concluſion muſt be rejected in the preſent inſtance, as the agent's aſſertion cannot be credited, ſince in it he endeavours to exempt himſelf from reſponſibility. The agency, therefore, is invalid, becauſe of the inadmiſſibility of the concluſion ariſing from it.—It is to be obſerved that the agent, in this inſtance, reſembles the owner of a *Mazoon*, or privileged ſlave, involved in debt.—In other words, if the maſter of an inſolvent *Mazoon* were to emancipate him, ſo as to be himſelf reſponſible for his value to the creditors *, and the creditors demand payment of the whole of the debts from the ſlave, appointing the maſter agent for the receipt of them, the agency would be invalid, becauſe of the two reaſons above recited, in treating of the agency of a *ſurety*.

---

* Arab. *Ameen*;—meaning a *confident*; one whoſe word muſt be relied upon.

Caſe of a plea of agency urged for the receipt of a debt in abſence of the conſtituent.

IF a perſon plead his being agent for the receipt of a debt due to another perſon who is abſent, and the debtor verify his aſſertion, in this caſe he [the debtor] muſt be directed to deliver the debt to the agent; becauſe his verification of the claim is an acknowledgment againſt himſelf, ſince what the agent receives is purely the property of the debtor.—If, therefore, the abſent perſon afterwards appear, and verify the aſſertion of the agent, there will be no contention whatever: but if otherwiſe, the debtor muſt again pay the debt to the abſentee, (who is now preſent,) becauſe his former payment of it is not eſtabliſhed, as the creditor denies the agency; and his denial of agency, if confirmed by an oath, muſt be admitted.—The former payment through the agent is therefore invalid; and the debtor is conſequently entitled to retake from him whatever he had paid to him, provided it be ſtill extant in his poſſeſſion; becauſe his object, in making the payment, was to free himſelf from reſponſibility; and as this object has not been fulfilled, he has therefore a right to retake it.—If, however, the thing be not extant in the poſſeſſion of the agent, but have been deſtroyed, in that caſe the debtor is not entitled to retake any thing from the agent, ſince he, by his verification, acknowledged the right of the agent to the receipt of it.—As the debtor, however, in this inſtance, ſuffers an oppreſſion from his credulity, and it is not lawful for the oppreſſed to oppreſs others, he is not allowed to take any thing from the agent, in caſe of the deſtruction of the thing given to him;—unleſs, at the time of making the payment to the agent, he had taken the agent himſelf as ſecurity for the reſtitution, in the event of the abſent perſon's denial of the agency; in which caſe it would be lawful for him to retake whatever he may have paid, as the agent became ſurety, and is conſequently liable for it.

---

* See *Manumiſſion*, Vol. I. Book V.

Objection.—The ſecurity, in this caſe, ought not to be valid, ſince it is eſſential to the validity of bail or ſecurity that there be a debt due by the ſuretee; and the ſuretee, in the preſent inſtance, is the *conſtituent*, who does not owe any debt.

Reply.—The ſecurity is valid, becauſe it is referred to the period when the conſtituent ſhall have received the *ſecond* payment of his debt; in which caſe he is reſponſible in the conception of both the *agent* and the *debtor*; the ſecurity is therefore valid, in the preſent inſtance, in the ſame manner as in all other caſes.

—If, on the other hand, a perſon ſhould plead his being the agent of a certain abſentee for the receipt of a debt due to him, and the debtor, without either verifying or falſifying his claim, remain ſilent, and yet pay the debt, and the proprietor of the debt afterwards appear and exact payment of it from the debtor, he (the debtor) is in this caſe entitled to a repayment from the agent, becauſe he did not verify the agency; for in fact he did nothing elſe than make a payment in the hope that it would be acquieſced in by the conſtituent; and, on his being diſappointed in this hope, he is conſequently entitled to an indemnification from the agent.—The law is alſo the ſame where the debtor pays the debt to the agent, after falſifying his claim; as is obvious from the reaſons already ſtated.—It is however to be obſerved that, in the ſeveral caſes of *verification*, *falſification*, or *ſilence*, it is not permitted to the debtor to retake the article from the agent, after the delivery of it to him, until ſuch time as the conſtituent appears; becauſe the payment he has made is the right of the conſtituent from *probability*, (as in the caſe of his *verification*,) or from *conſtruction*, (as in the caſe of his *falſification* or *ſilence*,) ſince it is poſſible that the abſentee may afterwards give his aſſent to it.—It is, therefore, the ſame as if he had paid the debt to a *Fazoolee*, or unauthorized perſon, in the hope that the proprietor would confirm it; in which caſe it is not lawful to take back from the *Fazoolee* what he may have delivered to him; becauſe there exiſts a poſſibility of a confirmation of it by the owner; and alſo, becauſe it is a general rule that, when a perſon performs an act with any particular view or object, he ought not to undo the ſame unleſs he be diſappointed of the object which prompted it.

Caſe of a plea of agency urged for the receipt of a *truſt*, in abſence of the conſtituent.

IF a perſon plead his being the agent of a certain perſon for the receipt of a *depoſit*, and the truſtee verify his aſſertion, yet the law does not award the delivery of the depoſit by the truſtee to this perſon, ſince (in oppoſition to the preceding caſe of a *debtor*) the truſtee here makes an acknowledgment with reſpect to the property of another.—If, however, the perſon in queſtion plead that "his father "having died, the ſaid depoſit had devolved by inheritance to him, "and that there were no other heirs," and the truſtee verify this, he muſt be directed to deliver the depoſit to this perſon; becauſe the truſt is no longer the father's property, after his deceaſe; and the truſtee and the perſon in queſtion are both agreed in its being the property of the heir:—the truſtee, therefore, muſt be directed to deliver his truſt to this perſon, as being the heir.

A perſon commiſſioned to receive a *truſt*, on the plea of having purchaſed it, is not entitled to receive it from the truſtee.

IF a perſon plead that he had purchaſed a depoſit from the proprietor of it, and the truſtee verify his aſſertion, yet the truſtee is not entitled to deliver the depoſit to him; becauſe the verification of the truſtee during the lifetime of the depoſitor is an acknowledgment with reſpect to the property of another: and hence their aſſertions (namely, that of the truſtee and of the perſon who prefers the claim) are not valid, with regard to the eſtabliſhment of proof of the ſale on the part of the proprietor.

A perſon commiſſioned to receive a debt, is entitled to receive it, although the debtor plead his having already paid it.

If a perſon appoint an agent for the receipt of a debt due to him, and the debtor plead that he had acquitted himſelf of the debt to the proprietor, yet it is incumbent on him to pay the debt to the agent; becauſe the agency is here clearly eſtabliſhed; but the debtor's acquittance is not eſtabliſhed by his aſſertion: he is therefore not permitted to delay the payment;—but after he has made the payment, he has a claim upon the creditor, and may exact an oath from him: but an oath cannot be exacted from the *agent*, ſince *he* is only a *ſubſtitute*.

The ſeller of an article cannot be compelled to take back the article from the purchaſer's agent, on a plea of defect, until the purchaſer ſwears to the defect.

If a perſon purchaſe a female ſlave, and afterwards plead a defect in her, and appoint an agent to manage the litigation with the ſeller, on this account, and then diſappear,—and the agent accordingly inſtitute a ſuit againſt the ſeller for the defect, and the ſeller plead that the purchaſer had knowingly acquieſced in that defect,—in this caſe the ſlave is not to be returned to the ſeller; but a ſuſpenſion muſt take place until the appearance of the purchaſer, who will then be required to declare upon oath that he did not acquieſce in the defect.—It is otherwiſe in the caſe of *a debt*, (as before recited;) for there the debt muſt be paid to the agent for ſeizin, in behalf of the creditor, notwithſtanding the debtor may plead his having previouſly acquitted himſelf of it; becauſe it is there practicable to make a reparation, by enjoining reſtitution from the agent of the amount he may have received, on the error being made apparent by the conſtituent refuſing to ſwear; whereas, in the caſe in queſtion, if an annulment of the ſale were decreed in conſequence of the defect, it cannot afterwards be revoked, ſince a decree for diſſolving a ſale takes full effect, and continues in force, although an error ſhould afterwards appear with reſpect to the defect pleaded.—This is the doctrine of *Haneefa*: according to whom, alſo, an oath cannot be tendered to the purchaſer, after the annulment of the ſale, and the return of the ſubject of it, ſince it is then to no purpoſe.—In the opinion of the two diſciples, alſo, the ſale ought in this caſe to be annulled, and the ſubject of it returned, without a ſuſpenſion of it on the oath of the purchaſer, ſince (according to them) a reparation is practicable, even in this caſe, becauſe, if an error ſhould appear in the decree of the *Kâzee*, in conſequence of the conſtituent's refuſal to ſwear, then the decree becomes null, and the ſubject of the ſale is returned to the purchaſer.—Some have ſaid that, according to *Aboo Yooſaf*, the moſt authentic doctrine is that in both caſes a ſuſpenſion ſhould take place;—that is to ſay, in the caſe of the *debt*, the payment to the agent ought to be deferred, and in the caſe in queſtion the return of the ſubject of the ſale to the agent of the buyer ought alſo to be deferred;—becauſe he directs his attention to the intereſt of the *ſeller*; (whence it is that if the purchaſer ſhould afterwards appear, an oath is exacted from him without the neceſſity of the ſeller's preferring a formal plea for it:)—the return, therefore, of the article ſold, by the purchaſer's agent, is ſuſpended, until the purchaſer himſelf appear and make oath,—out of tenderneſs to the right of the *ſeller*.

A perſon receiving money, to appropriate to a particular purpoſe, may pay his own money in lieu of it.

IF a perſon give another ten *dirms*, in order that he may give them to the family of this perſon for their maintenance, and the agent, inſtead of the ſpecific *dirms* he had received, give ten *dirms* of his own, this is not a *gratuitous* payment; on the contrary, he is entitled to retain the ſpecific *dirms* he received in lieu of thoſe he gave; becauſe an agent for the delivery of maintenance is like an agent for purchaſe; and ſuch is the law, as has been already related, in treating of an agent for purchaſe.

CHAP. IV.

Of the *Diſmiſſion* of *Agents*.

A conſtituent may diſmiſs his agent at pleaſure; except where the right of another perſon is concerned.

It is lawful for a conſtituent to diſmiſs his agent, becauſe the agency being *his right*, he may conſequently, if he pleaſe, annul it: excepting, however, when the right of another is interwoven with it; as where the agent is an *agent for litigation*, appointed at the requeſt of the *plaintiff*, in which caſe the conſtituent (who is the defendant) cannot diſmiſs the ſaid agent, becauſe of the connexion of the right of the plaintiff, ſince, if he ſhould diſmiſs him, the right of the plaintiff would be ſet at nought. The agency in this inſtance, therefore, reſembles agency interwoven with a contract of pawnage, by the pawner, at the time of ſettling the contract of pawnage, appointing a perſon his agent for the purpoſe of ſelling the pledge, and with the price ſo obtained diſcharging the debt due to the pawn-holder; in which caſe, as the right of the pawn-holder is connected with the agency, it is in the power of the conſtituent to diſmiſs ſuch an agent; and ſo alſo in the preſent inſtance.

An agency continues in force, until the agent receives due notice of his diſmiſſion.

If a conſtituent diſmiſs his agent, and the agent ſhould not receive any intelligence of it, his agency continues in force until he beappriſed of his diſmiſſion; and all his acts until then are binding, as his diſmiſſion is a detriment to him; becauſe it annuls his power of action; and alſo, becauſe the rights of contracts of purchaſe and ſale appertain and reſult to him; and accordingly, an agent for purchaſe does himſelf pay the price from the eſtate of the conſtituent, and an agent for ſale delivers the ſubject of the ſale to the purchaſer; if,

Digitized by Google

if, therefore, the diſmiſſion were to operate inſtantaneouſly, without his intelligence, and he ſhould, under theſe circumſtances, either make a payment of the price, or delivery of the goods, he muſt, in ſuch caſe, become reſponſible, which is an injury to him.—It is to be obſerved that agents for *marriage*, or the like, are in this reſpect conſidered in the ſame light.—A queſtion has been ſtarted whether it is requiſite that the notification of the diſmiſſion of an agent be made by *two* men, or by *one* upright man: but as the law, on this head, has already been laid down in treating of the duties of the *Kázee*, (under the head of *Decrees relative to Inheritance*,) it is here unneceſſary to repeat it.

A commiſſion of agency is annulled by the death, confirmed lunacy, or apoſtacy of the conſtituent:

If a conſtituent die, or become an abſolute idiot, or having apoſtatized, be united to a hoſtile country, in all theſe caſes the commiſſion of his agent becomes null; becauſe a commiſſion of agency is not a thing of an *abſolute* or *irrevocable* nature, ſince it is in the power of the conſtituent, without the conſent of the agent, to diſmiſs him; and ſuch being the caſe it neceſſarily follows that the exiſtence of it muſt depend on the exiſtence of the power which created it originally, as it is requiſite that the conſtituent ſhould, during every moment of its exiſtence, continue to poſſeſs the ſame power or capacity with reſpect to its formation, as he did at the beginning;—and this power or capacity ceaſes in conſequence of the abovementioned accidents.—The *abſolute* idiotiſm here mentioned is conditioned by *Kadoore*, as a *ſmall* degree of it ſtands only as a temporary deprivation of *ſenſe*.—The limit of abſolute idiotiſm, according to *Aboo Yooſaf*, is fixed at *one month*, ſince by that ſpace of lunacy the duty of faſting is remitted.—It is alſo related, as an opinion of *Aboo Yooſaf*, that its limit is no more than *one night and one day*, ſince by that ſpace of idiotiſm the obſervance of the five ſtated prayers is remitted,—whence it is that an idiot in that degree is conſidered as *defunct*.—*Mohammed* has ſaid that the limit ought to be extended to a *complete year*, ſince in that ſpace of time idiotiſm occaſions the omiſſion of all the religious duties preſcribed to a *Muſſulman*; and that, therefore, from a principle of caution, it ought to be extended to that period.—With reſpect to the expreſſion "or having apoſtatized, be united to a hoſtile country," (as mentioned in this caſe,) lawyers obſerve that it is the doctrine of *Haneefa*; becauſe, according to him, all the acts of a perſon who ſimply apoſtatizes remain *ſuſpended*: if, therefore, he afterwards repent, and return to the faith, his acts (and conſequently his commiſſion of agency) are confirmed; but if he be either put to death on account of his apoſtacy, or fly to the infidels, his acts are rendered void, and his commiſſion of agency is annulled.—In the opinion of the two diſciples, on the other hand, the acts of an apoſtate are valid, and therefore his commiſſion of agency is not annulled, unleſs in caſe of his dying, or being put to death, or being expatriated, by a decree of the *Kâzee*.

but not by apoſtacy if the conſtituent be a *woman*.

If the conſtituent be a woman, and apoſtatize, her conſtitution of agency, nevertheleſs, remains binding until her death, or until her removal to an infidel country, becauſe it has been determined that the apoſtacy of a woman has no effect on her *contracts*, ſuch as *ſale*, or the like.

Caſes in which an appointment of agency by a *Mokâtib*, a *Mazoon*, or a *copartner*, are annulled.

If a *Mokátib* appoint an agent, and afterwards become incapable of diſcharging his ranſom,—or, if a privileged ſlave appoint an agent, and afterwards be laid under reſtrictions,—or, if one of two partners appoint an agent, and the partners ſhould afterwards ſeparate and diſſolve their partnerſhip, in all theſe caſes the agency becomes null, whether the agent may or may not have received intelligence of theſe ſupervenient circumſtances, (ſuch as the incapability of the *Mokátib*, and ſo forth,) for the reaſon already aſſigned, that "the continuance of agency depends on the continual exiſtence of the power and capacity of the conſtituent to create it;" which power diſcontinues in conſequence of any of the above circumſtances. Now this reaſon obtains in either caſe; (that is, whether the agent be informed of theſe circumſtances,

Digitized by Google

circumſtances, or *not*:) in either caſe, therefore, the agency is annulled.—The reaſon of this is that the diſmiſſion of the agent is a diſmiſſion *by effect* and *of neceſſity*, and therefore does not reſt upon his knowledge;—in the ſame manner (for inſtance) as an agent for ſale is diſmiſſed when the thing is ſold by the conſtituent; in which caſe the agency neceſſarily ceaſes, as the *ſubject* of it no longer remains.

A commiſſion of agency is annulled by the death or lunacy of the *agent*;

IF an agent ſhould die, or become an abſolute idiot, the agency ceaſes; becauſe the *continuance* of agency ſtands on the ſame ground as its *commencement*; and as, at the commencement, it is requiſite that the agent be capable of executing the orders of his conſtituent, it follows that the continuance of this capacity is a condition of the continuance of the agency; and this capability ceaſes in the preſent inſtance, in conſequence of the death or idiotiſm.—In the ſame manner alſo, if an agent apoſtatize and go to an infidel country, his acts are not binding; unleſs he again become a *Muſſulman*, and return, in which caſe the agency reverts to him.—The author of this work obſerves that this is according to *Mohammed*; but that, according to *Aboo Yooſaf*, the agency does not revert, notwithſtanding the agent's returning to the faith and to his country.—The argument of *Mohammed* is that a commiſſion of agency is a *latitude*, or *endowment with power of action*, as it is the renewal of the bar to ſuch power, which would otherwiſe oppoſe itſelf. Now the agent's power of action, ſo far as merely regards *himſelf*, reſts upon the exiſtence in him of certain qualities, namely *rationality*, *freedom*, and *maturity of years*; and he has been rendered incapable of exerting that power merely by a ſupervenient circumſtance, (namely, his deſertion to a hoſtile country;) when, therefore, the cauſe of this diſability is removed, if the latitude ſtill continue in force, he again becomes an agent, as before. The reaſoning of *Aboo Yooſaf* is that a commiſſion of agency is an inveſtiture with a power of *paſſing*;—in other words, the agent, in virtue of his commiſſion, is poſſeſſed of a power of *paſſing* his acts, ſo that they

or, by his apoſtacy and flight to a hoſtile country.

they ſhall be binding upon another, namely, his conſtituent: in ſhort, in virtue of his appointment, he is inveſted with the power of *paſſing* his acts, but not with the power of *performing* thoſe acts; as *this* power he poſſeſſed in virtue of his *natural competency*.—Now the power of *paſſing* acts, or, in other words, *agency*, ceaſes on apoſtacy and deſertion to a hoſtile territory, as theſe circumſtances are held to be the ſame as the *death* of a *Muſſulman*; and it does not afterwards revive on the agent's again becoming a *Muſſulman*, and returning to the abode of the *Muſſulmans*; in the ſame manner as (in ſuch a caſe) the property in an *Am-Walid* or a *Modabbir* does not revive; in other words, if a maſter apoſtatize and go to the abode of the infidels, his *Modabbirs* and *Am-Walids* become free, and his property in them does not revive in caſe of his returning to his faith and his country*.

Agency is not renewed by the repentance and return of an apoſtate conſtituent.

If a conſtituent become a *Muſſulman*, and return to the country of the *Muſſulmans*, after having apoſtatized and gone off to a hoſtile country, the power of his agent, which had been annulled, does not in that caſe revive, according to the *Zâhir-Rawâyet*.—*Mohammed* is of opinion that the agency revives, in the ſame manner as in the preceding caſe of the apoſtacy of the *agent*.—The reaſon for the diſtinction (according to the *Zâhir-Râwayet*) between the caſe of an apoſtate *conſtituent* and an apoſtate *agent* is, that the foundation of agency, with reſpect to a *conſtituent*, is *property*, which becomes null in conſequence of apoſtacy; but the foundation of it, with reſpect to an *agent*, is *rationality*, *freedom*, *ſkill*, and *maturity of years*, circumſtances which are not extinguiſhed by apoſtacy.

Agency for any particular act is annulled by the conſtituent himſelf performing that act.

If a perſon appoint another his agent for any particular concern, and afterwards execute that concern himſelf, the agency in ſuch caſe becomes null.—This caſe admits of a variety of modes; as where, for inſtance, a perſon appoints an agent to emancipate his ſlave, or to make him a *Mokâtib*, and he afterwards himſelf emancipates, or makes a *Mokâtib* of, the ſlave,—or, where a perſon appoints an agent for the contracting of marriage between him and a particular woman, and he himſelf afterwards concludes the contract,—or, where a perſon appoints another his agent for the purchaſe of a ſpecific article, and he himſelf afterwards purchaſes that article,—or, where a perſon appoints a perſon to divorce his wife, and he himſelf afterwards divorces her three times, (or divorces her *one* time, and her *edit* expires,)—or, where a perſon appoints an agent to conclude a *Khoola* with his wife, and he himſelf afterwards concludes the *Khoola* with her;—for in all theſe caſes the agency (becauſe of its impracticability in conſequence of the anticipation of the conſtituent in the performance of theſe acts) is null; inſomuch that, in the caſe of *marriage*, if the conſtituent ſhould afterwards irrevocably divorce the woman he had ſo married, it would not then be lawful for the agent to contract a marriage with her in behalf of the conſtituent, becauſe the object of the conſtituent, in the agency, had been already obtained, and the neceſſity of it, of conſequence, no longer exiſted. (It is otherwiſe, however, where the *agent* contracts the woman, and afterwards divorces her in behalf of the conſtituent; becauſe, in this inſtance, the conſtituent's object in the agency has not been obtained, and conſequently the neceſſity for it ſtill exiſts.)

---

* See vol. II. p. 232.

An agency diſſolved by any act of the conſtituent cannot afterwards revive.

IF a perſon appoint another his agent for the ſale of a ſlave, and afterwards ſell that ſlave himſelf, and the purchaſer return the ſlave to him, in conſequence of a decree of the *Kâzee*, founded on the proof of a defect, it is related as an opinion of *Aboo Yooſaf*, that the agent is not then entitled to ſell the ſaid ſlave, becauſe the conſtituent, in ſelling him himſelf, did virtually prohibit the agent from executing the deed, and it conſequently becomes the ſame as if he had diſmiſſed him.—*Mohammed*, on the other hand, alleges that the agent may in this caſe reſell him, becauſe the agency ſtill exiſts, ſince (according to him) agency is the *licencing of action*.—It is otherwiſe where a perſon appoints an agent for executing a gift, and afterwards makes the gift himſelf, and again retracts it; for in this caſe it is not lawful for the agent

Digitized by Google

agent to make the gift, ſince the voluntary retraction of it by the conſtituent did clearly indicate his wiſh that it ſhould not take place: in oppoſition to the caſe of the return of the ſubject of a ſale founded on a decree of the *Kâzee* to the conſtituent, becauſe there the conſtituent acts from neceſſity in the receiving of it; and there exiſts of courſe no argument to ſhew that he does not wiſh the ſale to take place: when, therefore, the ſubject of the ſale, in conſequence of being returned, becomes completely his property, the agent is entitled to reſell it.

HEDÂYA.

BOOK XXIV.

Of DÂWEE, or CLAIMS.

Chap. I. Introductory.
Chap. II. Of Oaths.
Chap. III. Of *Takhâlif*; that is, ſwearing both the *Plaintiff* and the *Defendant*.
Chap. IV. Of Things claimed by two Plaintiffs.
Chap. V. Of Claim of Parentage.

CHAP. I.

Diſtinction between *plaintiff* and *defendant*.

THE *Moodâa*, or *plaintiff*, is a perſon who, if he ſhould voluntarily relinquiſh his claim, cannot be compelled to proſecute it; and the *Moodaa-ali-hee*, or *defendant*, is a perſon who, if he ſhould wiſh to avoid the litigation, is compellable to ſuſtain it.—Some have defined a plaintiff, with reſpect to any article of property, to be a perſon who, from his being diſſeized of the ſaid article, has no right to it but by the eſtabliſhment of proof; and a defendant to be a perſon who has a plea of right to that article from his ſeizin or poſſeſſion of it. *Mohammed*, in the *Mabſoot*, has ſaid that a defendant is a perſon who *denies*.—This is correct: but it requires a ſkill and knowledge of juriſprudence to diſtinguiſh the denier in a ſuit; as the *reality* and not the *appearance* is efficient; and it frequently happens that a perſon is in appearance the *plaintiff*, whilſt in reality he is the *defendant*. Thus a truſtee, when he ſays to the owner of the depoſit, "I have reſtored "to you your depoſit," appears to be *plaintiff*, in as much as he pleads the return of the depoſit; yet in reality he is the *defendant*, ſince he denies the obligation of reſponſibility; and hence his aſſertion, corroborated by an oath, muſt be credited.

A plaintiff muſt particularly ſtate the ſubject of his claim;

No claim is admiſſible unleſs the plaintiff explain the ſpecies and quantity of the article which is the object of it; becauſe the end of a claim is, upon the eſtabliſhment of the proof, to obtain a decree of the *Kâzee* for rendering the matter obligatory upon the defendant; but no obligation can take place with reſpect to a matter of *uncertainty*.—

which (if it be *moveable* property) muſt be produced in court.

If, therefore, the article be ſtill exiſting, and in the poſſeſſion of the defendant, he is required to produce it in the court of the *Kâzee*, in order that the plaintiff may pointedly refer to it in the exhibition of his claim. In the ſame manner, the production of it is neceſſary at the time of the delivery of teſtimony, or of the adminiſtration of an oath to the defendant; becauſe on theſe occaſions the greateſt poſſible degree of certainty and knowledge is requiſite; and this is beſt anſwered by a *pointed reference* with reſpect to *moveable property*, ſuch as may be brought into the court of the *Kâzee*, ſince a pointed reference moſt completely aſcertains and determines any thing.

WHEN

Digitized by Google

The defendant muſt appear, to anſwer to a valid claim;

WHEN the claim of the plaintiff is of a valid nature, the appearance of the defendant is neceſſary. This practice has been followed by *Kázeès* in all ages.—It is, moreover, incumbent on the defendant to give a reply to the plea, when he is preſent, in order that the object of his preſence may be anſwered. It is alſo neceſſary to produce the *ſubject* of the claim, for the reaſon already ſtated.—It is likewiſe incumbent on the defendant, in caſe of his *denial*, to take an oath, as ſhall be explained in the latter part of this chapter.—If the ſubject of the claim be not preſent, a bare explanation of the *quality* of it is not ſufficient; for it is indiſpenſible, in this caſe, that the *value* be ſpecified, in order that the ſubject of the claim may be fully aſcertained; becauſe the ſubſtance of an entity is known by an explanation of its *value*, and not by that of its *quality*, ſince many individuals of that genus may partake of the ſame qualities; and as an *actual ſight* of the article is, in this inſtance, unattainable, an explanation of the value is accepted in the place of a pointed reference to it.—(The lawyer *Aboo Leys* has ſaid that to an explanation of the *value* ought to be added that of the *gender*.)—If the claim relate to land, or other immoveable property, it is requiſite that the plaintiff define the boundaries, and ſay "that land is in the poſſeſſion of the defendant, and I claim "it from him;"—becauſe ſuch property cannot be deſcribed by a pointed reference, as it is utterly impoſſible to produce it in the aſſembly of the *Kâzee*; a definition of the boundaries therefore ſuffices, as immoveable property may be aſcertained by ſuch a definition.—It is neceſſary to define the *four* boundaries, and to ſpecify the proprietors of each, adding a deſcription of their family, in which is required to go at leaſt as far back as the *grandfather*,—ſince (in the opinion of *Haneefa*) a knowledge of the grandfather is eſſential to the complete deſcription of a family: and this is approved. If, however, the proprietor of the boundary be a perſon of notoriety, the ſimple mention of him is ſufficient.—If, alſo, only *three* of the boundaries be defined, it is ſufficient, according to our doctors; (contrary to the opinion of *Ziffer*;)—becauſe a definition is in this caſe made of a *majority* of them;

and muſt produce the ſubject of it;

or the *value* of it muſt be ſpecified.

or (if the object conſiſt of *land*) the plaintiff muſt define the boundaries, &c. and muſt make an explicit demand of it.

and the *majority* is equivalent, in effect, to the *whole.*—It is otherwiſe where all the four boundaries are mentioned, and there happens to be a miſtake with reſpect to one of the four, for in this caſe the claim is falſified: in oppoſition to the caſe where a definition of one of them is omitted, as that does not induce a falſification of the claim.—(It is to be obſerved that, in the ſame manner as a definition of the boundaries is requiſite in a *claim* regarding immoveable property, ſo is it alſo requiſite in *giving evidence.*)—With reſpect to what was before advanced, that the plaintiff muſt ſay "*that land is in the poſſeſſion of* "*the defendant*, &c." this is indiſpenſibly requiſite; becauſe the defendant is not liable to the ſuit, unleſs he be poſſeſſed of the land. As, however, the aſſertion of the plaintiff and the verification of the defendant is not alone ſufficient to prove this, it is requiſite that the plaintiff prove the poſſeſſion of the defendant by the evidence of witneſſes, or that the *Kâzee* be himſelf acquainted with the circumſtance. This is approved; becauſe in the aſſertion of the plaintiff and the verification of the defendant there is room for ſuſpicion, ſince it is ſtill poſſible that the land may be in the poſſeſſion of another, and that they may have agreed in its being in the poſſeſſion of the defendant, to induce the *Kâzee* to paſs a decree.—It is otherwiſe with reſpect to *moveable* property, becauſe the ſeizin of the poſſeſſor being, in that caſe, determinable by ſight, there is no neceſſity for proof by means of witneſſes.—With reſpect to the plaintiff's ſaying "I claim it from "the defendant," this is alſo indiſpenſibly requiſite; becauſe to demand it is his right, and the demand muſt therefore be made; and alſo, becauſe it is poſſible that the land may be in the poſſeſſion of the defendant in virtue of pawnage,—or detention after a ſale of it, to anſwer the price,—and this apprehenſion is removed by the claim of it.—Lawyers have obſerved that becauſe of the above poſſibility, it is requiſite, in a caſe of moveable property, that the plaintiff declare that the thing is *unjuſtly* in the poſſeſſion of the defendant.

A claim for *debt* requires only the *claim*,

IF the claim relate to *debt*, it is ſufficient for the plaintiff to ſay "I claim it." For as the perſon on whom the obligation reſts is himſelf preſent, there remains only the claim of it; and this it is incumbent on the plaintiff to make, becauſe it is his right, and alſo, becauſe, until he himſelf claim it, the *Kázee* can take no notice of it. It is, however, neceſſary that he explain whether it conſiſt of *dirms* or *deenárs*, and whether it be gold or ſilver, as ſuch explanation defines the debt.

and a deſcription of the ſpecies and amount.

Proceſs to be obſerved by the *Kázee*.

WHAT has now been mentioned is an explanation of the validity of claims.—It is to be obſerved that where the claim of a plaintiff is valid, the *Kázee* muſt interrogate the defendant, and aſk him "whether the plea be true or not?" If he acknowledge the truth of it, then the *Kázee* muſt paſs a decree, founded upon his acknowlegment, becauſe acknowledgment does in itſelf produce the effect: the *Kázee* muſt, therefore, order the defendant to give up the poſſeſſion of the article concerning which he has made the acknowledgment, and to deliver it to the plaintiff.—If, on the other hand, the defendant *deny* the truth of the allegation, the *Kázee* muſt require the plaintiff to produce evidence, becauſe the prophet, in a caſe where a defendant objected to the allegation, ſaid firſt to the plaintiff "*have you evidence?*" and on his anſwering in the negative, he then ſaid "*it belongs to you to demand an oath from the defendant.*" Now it appears from this tradition, that the right of demanding an oath from the defendant reſts upon the defect of evidence on the part of the plaintiff; and hence it is requiſite firſt to demand the evidence of the plaintiff, and on his making known his inability to produce it, to demand an oath from the defendant.—If, therefore, the plaintiff produce evidence in atteſtation of his claim, the *Kázee* muſt paſs a decree in his favour, as in that caſe there cannot be any ſuſpicion of falſity.—If, on the other hand, he be unable to produce evidence, and demand the defendant to be put to his oath, in that caſe the *Kázee* (becauſe of the tradition above quoted,) muſt adminiſter an oath to him. The *demand of the plaintiff*, however, is requiſite to the exaction of the oath, as it is his right.

CHAP. II.

Of *Oaths.*

An oath muſt not be required of the defendant when the plaintiff's witneſſes (although not *immediately preſent*) are within call.

If a plaintiff declare that "his witneſſes are preſent in the city, but "not in the court of the *Kâzee*," and ſhould nevertheleſs demand an oath from the defendant, in that caſe (according to *Haneefa*) the defendant muſt not be required to take the oath. *Aboo Yooſaf* alleges that an oath muſt, in this caſe, be exacted from the defendant; becauſe it is eſtabliſhed, by the tradition before cited, that an oath is the right of the plaintiff; and it muſt conſequently be granted to him in caſe of his demanding it. The reaſoning of *Haneefa* is that the eſtabliſhment of a right in the plaintiff to exact an oath from the defendant is founded on the ſuppoſition of his inability to produce evidence, as is expreſsly declared in the above mentioned tradition.—Hence until his inability to produce evidence be made apparent, his right does not take place, any more than if the witneſſes were preſent in the court of the *Kâzee*. The opinion of *Mohammed* (as reported by *Khaſâf)* coincides with that of *Aboo Yooſaf*: according, however, to a report of *Tahâvee*, it coincides with that of *Haneefa*.

An oath cannot be exacted from the *plaintiff*.

An oath cannot be exacted from the plaintiff, becauſe of the ſaying recorded in the traditions of the prophet, "*evidence is incumbent on* "*the*

"*the part of the* APPELLANT, *and an oath on that of the* RESPONDENT;" from which it is evident that an oath is not in any ſhape incumbent on the plaintiff; otherwiſe the neceſſity of it would not have been reſtricted to the *reſpondent* or *defendant*.—(*Shafeï*, however, diſſents from this doctrine.)

The evidence adduced on the part of the *plaintiff* muſt be preferred to that adduced on the part of the *defendant*.

IF both the actual poſſeſſor [of the property] and the plaintiff ſhould adduce evidence in ſupport of their abſolute right of property, in this caſe the evidence of the perſon in poſſeſſion muſt be rejected and that of the plaintiff admitted.—*Shafei* maintains that the evidence of the poſſeſſor muſt be admitted, and a decree paſſed in his favour; becauſe the evidence is corroborated by the *poſſeſſion*, and is conſequently ſtrong and apparent; it ought therefore to be preferred, in the ſame manner as evidence in favour of the poſſeſſor is preferred in caſes of *birth*, *marriage*, or a claim to a ſlave that has been emancipated, or that has become an *Am-Walid*, or been conſtituted a *Modabbir*:—in other words, if two perſons ſhould ſeverally aſſert that a particular horſe, in the poſſeſſion of one of them, was the offspring of a horſe belonging to him, and if each ſhould bring evidence in ſupport of his aſſertion, in that caſe the evidence of the poſſeſſor would be preferred; and ſo alſo in the caſe of a conteſted wife who is in the poſſeſſion of one of the two claimants,—or in the caſe of a *freedman*, an *Am-Walid*, or *Modabbir*, who is in the poſſeſſion of one of the two perſons who claims the right of property.—In reply to this reaſoning of *Shafeï*, our doctors argue that it is not the *evidence adduced by the poſſeſſor* which proves the abſolute right of property, becauſe the poſſeſſion of itſelf indicates the abſolute right, and conſequently anticipates the proof, which would elſe have reſulted from the evidence. It is otherwiſe with reſpect to the evidence adduced by the perſon not in poſſeſſion, becauſe by that an abſolute right of property is proved*; and as the evidence on the part of the perſon not in poſſeſſion occaſions proof, it is therefore admitted; ſince as the purpoſe of evidence is to eſtabliſh proof, the evidence which occaſions proof muſt be preferred. It is to be obſerved that poſſeſſion indicates a right of property *abſolutely*, but not *relatively*, as in the caſes adduced by *Shafeï*; and hence the analogy conceived by him between theſe caſes and the caſe in queſtion is not juſt.

---

* As it is not anticipated by any other circumſtance, and conſequently muſt be admitted.

The defendant refuſing to ſwear, the *Kâzee* muſt forthwith paſs a decree againſt him.

IF the defendant refuſe to take an oath in a caſe where it is incumbent upon him, the *Kâzee* muſt then paſs a decree againſt him becauſe of his refuſal, and muſt render obligatory upon him the object of the claim on behalf of the plaintiff.—*Shafeï* maintains that the *Kâzee* muſt not paſs a decree immediately on the refuſal of the defendant, but muſt firſt adminiſter an oath to the plaintiff, and then paſs a decree againſt the defendant; becauſe the refuſal to take an oath admits of three different conſtructions:—I. it may proceed from a deſire to avoid a falſe oath;—II. it may proceed from an unwillingneſs to take an oath, although, in teſtimony of the *truth*, from an opinion of its being derogatory to the deponent's character; and, III. it may proceed from a doubt and uncertainty whether the matter be true or falſe;—and as the refuſal to take an oath is a matter of uncertainty, it cannot amount to *proof*, (ſince every thing of an uncertain nature is incapable of conſtituting proof;) and as the oath of the plaintiff manifeſts the right, recourſe muſt therefore be had to *that*.—The arguments of our doctors, on the other hand, are that the refuſal of the plaintiff to take an oath, indicates either a conceſſion of the thing claimed, or an acknowledgment of the validity of the claim; ſince, if the caſe were otherwiſe, he could have no motive to refuſe an oath when the maintenance of his right depended upon it.—Beſides, there are no grounds on which an oath can be tendered to a *plaintiff*, ſince the tradition before mentioned expreſsly evinces that an oath is reſtricted to the *defendant*.

Digitized by Google

IT is incumbent on the *Kázee* to give three notifications to the defendant, by three times repeating to him "I tender you an oath; "which if you take, it is well; if not, I will paſs a decree in favour "of the claimant."—This *threefold* repetition is required becauſe of the want of certainty in caſes of refuſal to take an oath, ſince there ſubſiſts a diſagreement with regard to the validity of paſſing a ſentence upon it.—(The neceſſity of the repetition has been recited by *Khaſáf*, as from a principle of *caution*, and to cut off the defendant from any further pretence.)—It is, indeed, an eſtabliſhed tenet, that if a decree be paſſed on *one* notification only, it is valid; and this is approved doctrine.—It is moſt laudable, however, to give three notifications.

The *Kazee* muſt give three ſeparate notifications to the defendant.

A REFUSAL to take an oath is of two kinds: I. *real*, (where the defendant expreſsly ſays "I will not take an oath;") and, II. *virtual*, (where he remains ſilent.)—The effect in this latter caſe is the ſame as in the former, provided it be known that the perſon refuſing is neither deaf nor dumb. This is approved doctrine.

Refuſal to ſwear is of two kinds, *real* and *virtual.*

IF a man claim marriage with a woman, or a woman with a man, and the defendant in either caſe deny the claim, then (according to *Haneefa*) it is not neceſſary to exact an oath.—The law is the ſame (according to *Haneefa*) with reſpect to a claim of reverſal [after divorce,] or of reſcindment in a caſe of *Aila*,—or a claim of ſervitude, or a claim of offspring, or claims of lineage, *Willa*, puniſhment, and *Laán*. Thus if, in a caſe of divorce, the wife, after the expiration of her *edit*, were to advance a plea of reverſal againſt her huſband, or the huſband to advance a plea of reverſal againſt his wife, and the defendant ſhould, in either caſe, deny the claim,—or if, in a caſe of *Aila*, either of the parties were to plead a reſcindment from the vow, and the other to deny it,—or, if a perſon were to claim the right of ſlavery to another whoſe condition is unknown, or he whoſe condition is unknown claim his being the ſlave of that other, and the defendant,

An oath cannot be exacted from the defendant in claims reſpecting *marriage, divorce,* AILA, *bondage,* WILLA, *puniſhment,* or LAAN.

in either caſe, deny the claim,—or, if a female ſlave were to plead her being an *Am-Walid* to a particular man, and that a certain perſon is their offſpring, and the man himſelf deny it [*],—or, if a perſon were to plead that another of unknown birth is his ſon, or that other plead that this perſon is his father, and the defendant in either caſe deny the claim,—or, if a perſon were to plead that another of known condition had been emancipated by him, and that he therefore poſſeſſes the right of *Willa* over him, or that other plead that he had been emancipated by him, and the defendant, in either caſe, deny the claim,—or, if a perſon were to plead that another had committed whoredom, and that other deny it,—or, laſtly, if a wife ſhould plead that her huſband had ſlandered her,—in all theſe caſes it is not neceſſary (according to *Haneefa*) to exact an oath from the defendant.—The two diſciples maintain that it is requiſite to exact an oath from the defendant in all theſe caſes, excepting in the caſes of puniſhment, or of *Laân*;—for they argue that a refuſal to take an oath amounts to an acknowledgment, as ſuch refuſal is an argument that the party is falſe in his denial: a refuſal to take an oath is, therefore, an acknowledgment either in *reality* or in *effect*; and acknowledgments are admitted in all the above caſes. This ſpecies of acknowledgment, however, is of a *doubtful* nature, as it is not a perfectly *valid* acknowledgment; and puniſhment is remitted in conſequence of any doubt; and as *Laân* is alſo puniſhment in effect, they hold that, in that inſtance alſo, an oath cannot be impoſed.—The reaſoning of *Haneefa* is that a refuſal to take an oath amounts to a conceſſion of the object to the plaintiff; after ſuch refuſal, therefore, it remains unneceſſary to exact an oath, becauſe of the attainment of the object independant of it.—(It is moſt laudable to conſider the refuſal to ſwear in the light of a grant or conceſſion, as it avoids the conſequence of the defendant falſifying in his denial.)—Now as a refuſal to take an oath is ſhewn to be a conceſſion of the thing in diſpute, it follows that ſuch refuſal can have no effect in the above caſes, ſince they are not of ſuch a nature as admit of conceſſion: an oath, therefore, is not exacted from the defendant in ſuch caſes; becauſe the advantage propoſed, in exacting an oath, is to enable the *Kâzee* to paſs a decree in conſequence of the refuſal; and this advantage cannot be obtained in ſuch caſes.

---

[*] This caſe does not, like all the reſt, hold true when the terms of it are reverſed; for in caſe the claim ſhould have been made on the part of the *man*, it is conſidered as an acknowledgment, and the denial of the woman is then of no effect.

Objection.—If a refuſal to take an oath be equivalent to a conceſſion, the refuſal of a *Mokâtib*, or of a *privileged* ſlave, ought not to be admitted, ſince neither of theſe are competent to make a conceſſion.

Reply.—A refuſal to take an oath is conſidered as a conceſſion, in order to remedy the evil of contention:—the refuſal of *Mokâtibs* and *privileged* ſlaves is therefore admitted.

Objection.—If a refuſal to take an oath be a conceſſion, it ought not to be admitted in claims of *debt*, ſince the ſubject of a gift muſt neceſſarily be *ſubſtance*, whereas a debt relates merely to *quality*.

Reply.—The validity of a conceſſion of this nature, in caſes of debt, is admitted in conformity with the conception of the plaintiff; for he conceives the thing he receives to be that actual thing to which he is entitled. Beſides, *conceſſion*, in this inſtance, merely means *a ceſſation of obſtruction*; that is to ſay, the defendant does not obſtruct the plaintiff from taking his property, and he accordingly takes it, as property is a matter of but light concern.—It is otherwiſe with reſpect to the particulars before mentioned, as theſe are not matters of light concern, and hence it is not lawful for the defendant to make a *gift* of them.

A thief refuſing to ſwear becomes liable for the property ſtolen.

An oath muſt be exacted from a thief; and if he ſhould refuſe to take it, he becomes liable for the property, but does not ſubject himſelf to the penalty of amputation; becauſe his act involves two conſequences, namely, reſponſibility for the property, and the loſs of his hand; and as his refuſal eſtabliſhes the *firſt* conſequence, but not the *ſecond*, it is therefore the ſame as if the fact had been proved by one man and two women, in which caſe a reſponſibility for the property takes place, but not a loſs of the hand.

A claim founded on divorce before conſummation entitles a wife to her *half dower*, where the huſband declines ſwearing.

If a wife advance a claim againſt her huſband, by aſſerting that he had divorced her previous to conſummation, an oath muſt be tendered to the huſband, and if he refuſe to take it, he becomes reſponſible for her *half dower*, according to all our doctors, becauſe (according to them) oaths are admitted in caſes relative to divorce, and particularly where the object is *property*.—In the ſame manner alſo, oaths are admitted in caſes of marriage, where the wife claims her dower, as this is a claim relative to property, which is eſtabliſhed by a refuſal to take an oath, though the *marriage* be not thereby proved.—In the ſame manner alſo, oaths are adminiſtered in claims of parentage, where the claim relates to ſome right, ſuch as *inheritance* or *maintenance*, (as where a diſabled perſon claims that he is the brother of another, and that his maintenance is incumbent upon that other, who denies the ſame.)—In caſes alſo of invalid receſſions from gifts, (as where, a perſon wiſhing to retract his gift, the grantee aſſerts that he is his brother, and that, on account of ſuch relation, he has no right to retract,—and the granter denies the ſame,)—an oath is tendered to the defendant, as the objects of them are the rights alluded to.

Pleas of conſanguinity admit of an oath being tendered to the defendant.

An oath is not tendered, according to the two diſciples, in ſimple caſes of conſanguinity, unleſs where the relation is of ſuch a nature as to be eſtabliſhed by the acknowledgment of the defendant: as where a perſon, for inſtance, aſſerts that another perſon is his *father*, or his *ſon*,—or a woman aſſerts that a certain perſon is her *father*,—or a man or woman claims a right of *Willa*, or a man or woman claims marriage,—in which caſes, if the defendant acknowledge the relationſhip, the *Willa*, or the marriage, they are eſtabliſhed accordingly; and if the defendant *refuſe* to make oath, this (according to the two diſciples) is equivalent to acknowledgment. It is otherwiſe where a woman alleges that a certain perſon is her *ſon*, becauſe in that caſe the relationſhip depends on *another*, and therefore, as the acknowledgment of the defendant can have no effect, ſo neither will his refuſal to take an oath.

Caſe of a claim of *retaliation.*

If a perſon claim a right of retaliation upon another, and the defendant deny it, in this caſe (in the opinion of all our doctors) an oath muſt be adminiſtered to him.—If he refuſe to take it, and the retaliation relate to the *members of the body*, he muſt in that caſe ſuffer retaliation; but if it relate to *murder*, he muſt be impriſoned until he either confeſs or take an oath of exculpation.—This is according to *Haneefa.*—The two diſciples are of opinion that in either caſe a *fine* muſt be impoſed; becauſe, although (according to their doctrine) a refuſal to take an oath *is* an *acknowledgment*, yet it is attended with a degree of doubt, (as has been already explained;) and conſequently cannot eſtabliſh *retaliation*:—a fine of property is therefore due; eſpecially where the bar to the retaliation ariſes from a circumſtance on the part of the perſon who is liable to the retaliation; as when the avenger of blood claims for *wilſul* murder, and the defendant acknowledges *erroneous* murder.—The argument of *Haneefa* is that the members of the body of a man are conſidered in the ſame light with *property*, and hence a conceſſion with reſpect to them is admitted in the ſame manner as it is admitted in the caſe of *property*; for if a perſon ſhould ſay to another "cut off my hand," and that other accordingly cut it off, he would not be ſubject to any compenſation, which clearly proves that the conceſſion thereof is lawful, although it be not allowed to the man, in this inſtance, to cut off the hand*, as it is attended with no advantage to him.—In ſhort, conceſſions are allowed with reſpect to *parts* of the body, but not with reſpect to the *body itſelf*; and as a refuſal to ſwear, in caſes of retaliation with reſpect to the *parts* of the body, is a conceſſion

---

* In other words, "to *accept* of the gift or conceſſion."

Digitized by Google

ceſſion of an advantageous nature, (as being the means of terminating a contention,) it follows that the cutting off the hand is advantageous in this inſtance, in the ſame manner as it is advantageous to amputate a limb in a caſe of mortification, or to draw a tooth in caſe of exceſſive pain.

Where the plaintiff's witneſſes are within call, the defendant muſt give bail for his appearance for *three days:*

If a plaintiff aſſert that "his witneſſes are in the city," the defendant muſt, in that caſe, be required to give bail, to anſwer for his appearance within the term of *three days*, leſt he abſcond, and thus the right of the plaintiff be deſtroyed:—and it is lawful thus to take bail for his appearance, (according to our doctors,) as has been already explained *.—The taking of bail from the defendant, in this inſtance, immediately on the preferment of the allegation by the plaintiff, proceeds upon a favourable conſtruction of the law, becauſe of its being advantageous to the *plaintiff*, and not materially detrimental to the *defendant:* and the reaſon for taking it is that it is incumbent upon the defendant to make his appearance in court upon the inſtant of the claim; (whence it is that a perſon is immediately diſpatched to ſummon him;) and as this might prevent him from going on with any buſineſs in which he may be then employed, it is therefore lawful to take bail for his appearance.—The term of *three days*, as above mentioned, is recorded from *Haneefa*; and that term is approved.—In taking bail (according to the *Zâhir Rawâyet*) there is no difference between an unknown perſon and one of eſtabliſhed note; nor between the claim of a *large* and of a *ſmall* ſum. The declaration of the plaintiff, however, that "his witneſſes are in the city," is indiſpenſable towards the taking of bail for appearance: and hence, if the plaintiff ſhould ſay "I have no witneſſes,—or, "my witneſſes are abſent "from the city," bail is not in that caſe to be required from the defendant, as it is of no uſe †. If, therefore the defendant, in this

but if the witneſſes be not within call, bail cannot be required from the defendant.

---

* See *Bail*, Vol. II. Book XVIII.

† Becauſe the plaintiff, being deſtitute of witneſſes, cannot poſſibly eſtabliſh his claim.

inſtance, upon being applied to, give bail for his appearance, it is well: but if he refuſe, the *Kâzee* muſt then direct the plaintiff to attend and watch over him, in order that his own right may not be deſtroyed: excepting, however, where the defendant may happen to be a traveller, or about to travel, for then the plaintiff is to watch over him only whilſt in the court of the *Kâzee*; and if he ſhould take bail for his appearance under theſe circumſtances, it muſt be extended only to the breaking up of the court of the *Kâzee*; becauſe if either the bail or the watching over him were extended to a longer period, it would occaſion a detriment to the defendant, in as much as he would be prevented, during that ſpace, from purſuing his journey; but where it is limited to the time of the ſitting of the court, he is not ſubjected to any apparent inconvenience.—The particulars of *watching* or *attendance* will be explained in treating of *inhibition*.

SECTION.

Of the Manner of SWEARING, *and requiring an* OATH.

The oath muſt be taken in the name of GOD;

AN *oath* is not worthy of credit unleſs it be taken in the name of GOD, becauſe the prophet has ſaid "*whoever takes an oath, let him take it in the name of* GOD; *otherwiſe let him omit the oath entirely*:"—and alſo, becauſe he has declared "*whoever takes an oath otherwiſe than in the name of* GOD *is moſt certainly an* ASSOCIATOR [*]."

and the *Kâzee* muſt dictate the terms of it.

IT is incumbent upon the *Kâzee* to deſire the ſwearer to corroborate his oath by reciting the attributes of GOD.—Thus he muſt direct him, for inſtance, to ſay "I ſwear by the God than whom there is no other righteous God, who is acquainted with what is hidden and apparent, that neither by me, nor on my behalf, is the amount due to *Omar* which he claims, nor any part of it.—The *Kázee* is at liberty either to add or diminiſh from this oath as he pleaſes: but he muſt not ſo far extend his caution as to *repeat* the oath, becauſe it is not neceſſary to ſwear more than *once*.—If a perſon ſhould ſwear "by God, by the *merciful*, by the *moſt merciful*,"—it is conſidered as three oaths: but if the two laſt particles of ſwearing be omitted it is then only *one*.—It is to be obſerved that the *Kázee* has the option either of adding the corroboration to the oath, or of omitting it, and ſimply deſiring the defendant to ſwear "by God."—Some have ſaid that it is improper to preſcribe the corroboration to ſuch as are known to be virtuous, but that to all others it is neceſſary.—Others, again, have ſaid that the corroboration is neceſſary in claims to a *great* amount, but not where the amount is *ſmall*.

---

[*] Arab. *Mooſhârik*, meaning a *Pagan*, or a *Polytheiſt*.

Swearing by *divorce* or *emancipation* muſt not be admitted.

A defendant muſt not ſwear by *divorce* or *emancipation*, (as if he ſhould ſay, "if the claim preferred againſt me be juſt, my wife is divorced," or "my ſlave is emancipated,") becauſe of the tradition before quoted.—Some, however, have ſaid that, in our times, if the plaintiff ſhould importunately require it, the *Kázee* may then adminiſter to the defendant an oath by divorce or emancipation; ſince in this age there are many men who ſcruple not to ſwear by the name of God, but who are, nevertheleſs, averſe from an oath by *emancipation* or *divorce*.

Jews muſt ſwear by the *Pentateuch*, and Chriſtians by the *Goſpel*.

The *Kázee* muſt adminiſter an oath to a *Jew*, by directing him to ſay "I ſwear by the God that revealed the *Pentateuch* to *Moſes*;"—and to a *Chriſtian*, by directing him to ſay "I ſwear by the God that ſent down the *goſpel* of Jesus;"—becauſe the prophet, upon a certain occaſion, adminiſtered an oath to a *Jew*, by ſaying to him

"*I deſire you to ſwear by the* GOD *that hath ſent down the Pentateuch* "*to* MOSES, *that ſuch is the law with regard to whoredom in your* "*book*;" and alſo, becauſe the Jews believe in the divine miſſion of MOSES, and the Chriſtians in the divine miſſion of JESUS CHRIST.—In the adminiſtration of oaths to them, therefore, it is neceſſary to corroborate them, by a ſpecification of the books which have been received through their reſpective prophets.

Pagans muſt ſwear by GOD.

THE *Kázee* muſt adminiſter an oath to a *Majooſee*, by directing him to ſay "I ſwear by the GOD that created *fire*."—This is recorded, by *Mohammed*, in the *Mabſoot*; but it is related of *Haneefa*, in the *Nawâdir*, that he never adminiſtered an oath otherwiſe than in the name of GOD.—*Khaſâf*, moreover, reports that *Haneefa* never gave an oath to any excepting Chriſtians and Jews, otherwiſe than in the name of GOD, becauſe in confounding *fire* with *the name of* GOD, a reverence is ſhewn to it to which it is not entitled: contrary to the Old or New *Teſtament*, as theſe are the books of God, and therefore entitled to reverence. This doctrine has been adopted by ſeveral of our modern doctors.

AN oath cannot be adminiſtered to an idolater otherwiſe than in the name of GOD, becauſe all infidels believe in GOD, as is evident from this ſentence of the *Koran* "IF YE ASK OF THEM (the in-"fidels) WHO HATH CREATED YOU, VERILY THEY WILL ANSWER, "*GOD ALMIGHTY*."

Oaths muſt not be adminiſtered in an infidel place of worſhip.

AN oath muſt not be adminiſtered to infidels in their place of worſhip, becauſe the *Kâzee* is prohibited from entering ſuch a place.

The oaths of *Muſſulmans* need not be corroborated by ſwearing

IT is not neceſſary, in adminiſtering an oath to *Muſſulmans*, to corroborate it by means of the *time* or *place*, (ſuch as by the adminiſtration of it on a *Friday*, or in the *moſque*,) becauſe the object of an oath

Digitized by Google

them at a *particular time*, or in a *particular place*.

oath is a reverence to him in whoſe name it is taken, and this depends not on any particular time or place.—Beſides, if the corroboration of oaths to *Muſſulmans*, by a reſtriction to time and place, were neceſſary, it would ſubject the *Kázee* to an inconvenience, in the neceſſity he would be under of attending at the particular time and place; and the law admits not of inconvenience, more eſpecially where the fulfilment of right, or the execution of juſtice, does not depend upon it.

Caſes in which the oath of the defendant muſt relate to the *cauſe*; and caſes in which it muſt relate to the *object*.

If a perſon allege that he has bought a ſlave from another for a thouſand *dirms*, and the ſeller deny the fact; in this caſe the ſeller muſt be required to ſwear, in the following manner, "I ſwear by God that there does not abſolutely at preſent exiſt any contract of ſale between me and the plaintiff;"—and not in *this* manner, "I ſwear by God that I have not ſold, &c."—becauſe it often happens that a ſale is made, and afterwards an *Akála*, or diſſolution of the contract, takes place.—In caſes of uſurpation it is neceſſary that the defendant ſwear, in the preſence of the plaintiff, in this manner, "there is no part of that which you allege that I have uſurped from you, due by me," and not "*I have not uſurped*, &c."—becauſe an uſurpation is often done away by the proprietor ſelling or making a gift of the thing to the uſurper.—In caſes of *marriage* it is requiſite that the defendant ſwear to this effect, "no marriage does at this time ſubſiſt between me and the plaintiff;"—becauſe a marriage is ſometimes diſſolved by *Khoola*.—In caſes of *divorce* the huſband muſt ſwear "this woman is not *at preſent* finally ſeparated from me, by the divorce which ſhe pleads;"—and not, in an abſolute manner, that "he has not divorced her;"—becauſe a new marriage ſometimes takes place after a *Talák Báyeen*, or *complete* divorce.—Thus, in all theſe caſes, the *Kázee* muſt ſwear the defendant with reſpect to the *object* of the plea, and not with reſpect to the *cauſe* of it; ſince, if he were to adminiſter the oath with reſpect to the *cauſe*, it might be injurious to the defendant.—What is here advanced is conformable to the opinion of *Haneefa* and *Mohammed*.—*Aboo Yooſaf* is of opinion that, in all theſe caſes, the *Kâzee* muſt ſwear the defendant with reſpect to the *cauſe*, (except where the defendant particularly requeſts the contrary;) becauſe *ſales*, for inſtance, are ſometimes made, and afterwards diſſolved; *divorces* ſometimes executed, and afterwards ſucceeded by a marriage *de novo*; and uſurpations ſometimes done away by *gift* or *ſale*:—in all theſe caſes, therefore, the oath muſt be adminiſtered with reſpect to the *object*.—Some have ſaid that the *Kâzee* ought to be guided by the denial of the defendant:—in other words, if the defendant deny the *cauſe*, let the oath relate to the *cauſe*,—or, if he deny the effect, let the oath relate to the *object*.—It is to be obſerved that (according to *Haneefa* and *Mohammed*) the oath muſt in every inſtance relate to the *object*, where the cauſe is of ſuch a nature as renders it liable to be done away by ſome other cauſe; excepting only where, in reſting the oath upon the *object*, the tenderneſs due to the plaintiff is likely to be deſtroyed; for, in this caſe, the oath (according to all our doctors) muſt be reſted upon the *cauſe*. Thus, if a wife, having been completely divorced, ſhould prefer a claim of maintenance againſt her huſband, and the huſband ſhould not think himſelf bound to comply, becauſe of his being of the ſect of *Shafeï*,—or, if a proprietor of a houſe, or of land, ſhould prefer a claim of preemption againſt the purchaſer of a contiguous property on a plea of *Shaffa*, and the purchaſer, being of the ſect of *Shafeï*, ſhould not admit his claim,—in theſe caſes (according to all our doctors) the oath ought to relate to the *cauſe*;—for, although the defendant could not deny, upon oath, the *cauſe* or *circumſtances* of the caſe, ſtill he might, upon oath, deny the *object*;—in other words, he might deny the validity of the claim as founded upon theſe circumſtances: if, therefore, the oath were to relate to the *object*, it would evidently be injurious to the plaintiff.—If, on the other hand, the cauſe be of ſuch a nature as cannot be removed or done away by ſome other cauſe, in that caſe the defendant's oath (according to all our doctors) muſt relate to the *cauſe*.—Thus, if a *Muſſulman* ſlave ſhould plead his having been emancipated, and his maſter deny this, in that caſe (as the LAW does not admit of a *Muſſulman* becoming a ſlave after having been once *free*) the oath tendered to the maſter muſt relate to the *cauſe*;—in other words, he muſt be required poſitively to ſwear "whether he "has ever emancipated this ſlave, or not?"—It is otherwiſe, however, with reſpect to a *female Muſſulman* ſlave, or an *infidel male* ſlave; becauſe both of theſe may be again ſubjected to ſlavery after having been rendered free;—the female ſlave, by being firſt emancipated, and then apoſtatizing and being united to a hoſtile country;—and the male ſlave, by being firſt emancipated, and then breaking his contract of fealty, and being united to a hoſtile country.

In a caſe of inheritance, the oath of the defendant muſt relate to his *knowledge*.

IF a perſon acquire a right to a ſlave by inheritance, and another prefer a claim of right to the ſaid ſlave, in that caſe the oath of the defendant muſt relate to his *knowledge*;—that is, he muſt be required to ſwear that he does not know the ſlave in queſtion to be the property of the plaintiff;—becauſe not being acquainted with the acts of the perſon from whom the inheritance deſcends, he cannot abſolutely ſwear that the ſlave is not the property of the plaintiff;—whereas, if he had acquired the ſlave by a *gift* or *purchaſe*, he could ſwear poſitively as to his right of property, ſince *purchaſe* and *gift* are both cauſes of a right of property.

When a defendant enters into a compoſition with the plaintiff, an oath cannot afterwards be exacted from him.

IF a perſon prefer a claim againſt another, and the defendant deny it, but ſhould afterwards give the plaintiff ten *dirms*, either as an expiation for his oath, or as a compoſition for it, ſuch expiation or compoſition is valid; becauſe it has been ſo related by *Omar*; and the plaintiff cannot afterwards demand an oath from the defendant, as having himſelf deſtroyed this right.

CHAP

Digitized by Google

CHAP. III.

Tahâlif; or the ſwearing of both the *Plaintiff* and the *Defendant*.

A ſeller and purchaſer are mutually to ſwear where they both diſagree, and are deſtitute of evidence.

If a ſeller and purchaſer ſhould diſagree, the purchaſer aſſerting that the price of the goods was an *hundred dirms*, and the ſeller, that it was *more*,—or, if the ſeller ſhould acknowledge the *article ſold* to be *ſo much*, and the purchaſer aſſert that it was *more*,—in this caſe, if either of them adduce evidence in ſupport of his aſſertion, the *Kâzee* muſt paſs a decree in his favour; becauſe atteſtation is ſtronger than ſimple aſſertion.—If, on the other hand, both of them ſhould adduce evidence in ſupport of their reſpective aſſertions, then the evidence of the party that atteſts moſt muſt be admitted; becauſe the object of evidence is *proof*; and with reſpect to the *exceſs*, there is no oppoſition of evidence.—If the ſeller and purchaſer ſhould diſagree with reſpect both to the *price* and the *goods*, then the evidence of the ſeller with reſpect to the *price* is preferable; and the evidence of the purchaſer is preferable with reſpect to the *goods*. If, however, both parties be deſtitute of evidence, then the *Kâzee* muſt ſay to the purchaſer "if "you acquieſce in the price claimed by the ſeller, it is well; if not, "I will diſſolve the contract;"—and to the ſeller, "if you are con-"tented to yield the quantity of goods claimed by the purchaſer, it is "well; if not, I will diſſolve the contract;"—becauſe the object is to terminate the contention; and it is probable that his thus addreſſing them may terminate the contention, ſince the parties may poſſibly be averſe to breaking off the contract; when, therefore, they perceive that if they do not agree, the contract will be broken, they may be content to make up their difference.—If, nevertheleſs, they ſhould not even then agree, the *Kázee* muſt make each of them ſwear to his denial of the claim of the other.—This mutual ſwearing, before ſeizin of the article of ſale, is conformable to analogy; becauſe the ſeller demands a large price, which the purchaſer does not admit; whilſt, on the other hand, the purchaſer demands from the ſeller the delivery of the goods at the rate of purchaſe money he has paid, which the ſeller refuſes to execute. Each, therefore, is a *defendant*; and hence an oath muſt be required from each.—After the delivery of the goods to the purchaſer, indeed, the mutual ſwearing would be *contrary* to analogy; becauſe the purchaſer having received the goods has no further claim; and as there remains only the claim of the ſeller for the exceſs of the price, an oath can only be exacted from the *purchaſer*, who is the *defendant*. It appears, however, from an infallible guide, that an oath muſt, in this caſe alſo, be exacted from each, becauſe the prophet has ſaid "*Where a diſagreement takes place between a buyer and* "*ſeller, and the ſubject of the ſale is extant and preſent, an oath muſt* "*in that caſe be adminiſtered to each, and the purchaſer muſt afterwards* "*reſtore the goods to the ſeller, and the ſeller the price to the purchaſer.*" It is to be obſerved that where it is neceſſary to adminiſter an oath to both parties, the purchaſer muſt be firſt ſworn.—This doctrine is conformable to the moſt recent opinion of the two diſciples; and it is alſo agreeable to one report of *Haneefa*. It is alſo the moſt authentic doctrine; becauſe the denial of the purchaſer is of the greateſt importance, ſince the price is firſt demanded from him; and alſo, becauſe, in caſe of his refuſal to take the oath, it would be attended with the immediate advantage of inducing the obligation upon him of the payment of the price;—whereas, if the *ſeller* were firſt ſworn, it would nevertheleſs be neceſſary to defer the demand upon him of a delivery of the goods until he had received payment of the price.—If the parties ſhould diſagree in a ſale of *goods* for *goods*, (that is to ſay, in a *barter*,) or of *price* for *price*, (that is, in a *Sirf ſale*,) in this caſe the *Kázee* is at liberty either to ſwear the *ſeller* or the *purchaſer* firſt; becauſe in ſuch a caſe the ſeller and purchaſer are both upon an equal footing.

Formula of the oaths of a ſeller and purchaſer.

THE nature of the oath, in a diſagreement between buyer and ſeller, is this.—The ſeller ſwears "by GOD, I have not ſold the "thing in queſtion for a thouſand *dirms*;" and the purchaſer ſwears "by GOD, I have not bought it for *two thouſand dirms*." *Mohammed*, in the *Zeeadât*, has ſaid, "let the ſeller ſwear *by* GOD, *I have not* "*ſold it for* ONE *thouſand* DIRMS, *but for* TWO *thouſand*;—and let "the purchaſer ſwear, *by* GOD, *I have not bought it for* TWO *thouſand* DIRMS, *but for* ONE *thouſand*."—In other words, the negation and affirmation ought to be coupled together for the greater caution.—The moſt authentic doctrine, however, is that an oath of *negation* is ſufficient; becauſe oaths proceed upon denial, as appears from the tradition concerning *Kiſſâmit* *; for it is related that the prophet deſired the people of *Kiſſâmit* to ſwear that "by GOD, they had not com-"mitted the murder, and did not know the murderer."

Where both parties ſwear, the ſale muſt be diſſolved, by an order of the *Kâzee*.

IF the ſeller and purchaſer, in a diſagreement, ſhould both take an oath, the *Kâzee* muſt in that caſe diſſolve the ſale.—This is the adjudication of *Mohammed*: and it evinces that the ſale is not of itſelf diſſolved by the mutual ſwearing of the parties; becauſe, as the plea of neither party is eſtabliſhed, a ſale continues of an undefined nature; and hence the *Kâzee* muſt diſſolve it, as well to terminate their contention, as becauſe that, where the price is not eſtabliſhed, a ſale remains without a *return*; and this being an invalid ſale muſt conſequently be diſſolved, ſince it is indiſpenſably requiſite that all invalid ſales be diſſolved.

---

* The name of ſome *Arabian* diſtrict or tribe, where probably one of the prophet's followers was murdered.

IF,

A ſeller or purchaſer, upon declining to ſwear, loſes his cauſe.

If, in a diſagreement between a purchaſer and a ſeller, one of the two decline ſwearing, the claim of the other is in that caſe eſtabliſhed againſt him; becauſe by ſuch refuſal the party concedes to the other the article claimed by him;—for as his plea is thus rendered incapable of controverting the plea of the other, it follows that he accedes to that plea.

The parties are not to be ſworn where their diſagreement relates to ſomething not eſſential to their contract.

If the parties ſhould diſagree with reſpect to the period fixed for the payment of the price, or with reſpect to the option of determination, or with reſpect to a partial payment that may have been made of the price,—in none of theſe caſes are the parties to be ſworn, becauſe the diſagreement, in this inſtance, relates to ſomething not within the original ſcope of the contract. This diſagreement, therefore, reſembles a diſagreement with reſpect to an abatement or remiſſion of the price;—in other words, if a ſeller and purchaſer ſhould diſagree with regard to a remiſſion of part or the whole of the price, they would not in that caſe be ſworn; and ſo alſo in the caſe in queſtion.—The reaſon for what is here advanced is that the diſagreement, in all of the ſuppoſed caſes, relates to a thing which, if annihilated or done away, would not affect the exiſtence of the contract of ſale.—It is otherwiſe, however, where the diſagreement relates to the *ſpecies* of the price,—(ſuch as whether it is to conſiſt of *dirms* of *Bokhára* or of *Bagdad*,)—or with reſpect to the *genus* of it, (ſuch as whether it is to conſiſt of *dirms* or of *deenârs*,) for ſuch a diſagreement is the ſame as if it related to the *amount* of the price,—in which caſe oaths are adminiſtered, for this reaſon, that the *genus* and *ſpecies* of the price are inſeparable from the *ſubſtance* of it; becauſe the price is a debt due by the purchaſer; and a debt is only to be known and aſcertained by a definition of its *genus* and *ſpecies*. The period fixed for the payment of the price, on the contrary, is not of this nature, as it is not a ſpecies of it, whence it is that the price continues extant and firm after the promiſed time of payment has elapſed.

Digitized by Google

In diſputes reſpecting any ſuper-added ſtipulation, the aſſertion of the reſpondent muſt be credited.

If a diſagreement take place between a ſeller and purchaſer with reſpect to the *condition of option*, or the period of payment, the aſſertion of the reſpondent* ſupported by an oath, muſt be credited; becauſe optional conditions, and extenſions of the period of payment, are *accidents* in a ſale †; and with regard to *accidents*, the aſſertion of the *reſpondent* muſt be credited in preference.

The parties are not to be ſworn, where the goods periſh in the hands of the purchaſer.

If, after the deſtruction of the ſubject of a ſale, in the hands of the purchaſer, a diſagreement ſhould take place between the purchaſer and the ſeller reſpecting the amount of the price, the parties, in that caſe, (according to *Haneefa* and *Aboo Yooſaf*,) are not to be ſworn, but the aſſertion of the purchaſer muſt be credited.—*Mohammed* alleges that, in this caſe, the parties muſt be both ſworn, and afterwards the ſale diſſolved, in return for the value of the ſubject of it which had been deſtroyed;—that is to ſay, the purchaſer muſt pay the value of the goods to the ſeller, who muſt return to the purchaſer the price of them.—Such, alſo, is the doctrine of *Shafeï*.—The ſame difference of opinion obtains in caſes where the ſubject of the ſale has been removed from the property of the purchaſer by *gift* or the like, or where it is in ſuch a condition as would preclude the return of it in caſe of a *defect*.—The reaſoning of *Mohammed* and *Shafeï*, in ſupport of their opinions, is that each party pleads the exiſtence of a contract, different from what is claimed by the other; and each of them, conſequently, denies the aſſertion of the other.

Objection.—The advantage of adminiſtering an oath to each of the parties is that the ſale is thereby diſſolved, and the goods returned by the purchaſer to the ſeller, and the price by the ſeller to the purchaſer.—Now this object cannot be obtained after the deſtruction of the ſubject of the ſale, and therefore there can be no advantage in the doctrine of *Mohammed*, of ſwearing both parties under ſuch circumſtances.

---

* Arab. *Moonkir*.—meaning, *the perſon who denies*.

† That is, *are ſuperadded to the contract*.

Reply.—The advantage is that it relieves the purchaſer from the exceſs of the price, in caſe the ſeller ſhould refuſe to take an oath,—as, in the ſame manner, it obliges the purchaſer to pay ſuch exceſs, in caſe he himſelf ſhould refuſe to take an oath.

—They muſt therefore both be ſworn, in the ſame manner as when, after the deſtruction of the ſubject of the ſale, they diſagree with regard to the genus of the price, (that is, whether it conſiſt of *dirms* or *deenârs*:) and after ſwearing, the purchaſer muſt give the value of the goods to the ſeller, and the ſeller muſt return the price to the purchaſer. The arguments of *Haneefa* and *Aboo Yooſaf*, in ſupport of their doctrine upon this point, are twofold.—First, the ſwearing of both parties, after delivery of the goods, is repugnant to analogy; becauſe the purchaſer has, in this caſe, received whole and complete the thing which he claims: the ſwearing of both parties, moreover, is ordained by the law in caſes only where the ſubject of the ſale is *extant* and *complete*, to the end that the ſale may be diſſolved; but this cannot be conceived in a caſe where the ſubject of the ſale has periſhed; ſwearing the parties, therefore, after a deſtruction of the property, is not that *mutual ſwearing* expreſſed in the law.—Secondly, in the caſe in queſtion the *object* of the ſale (namely, the complete acquiſition of the goods by the purchaſer) is obtained; and after the completion of the *object*, a diſagreement with reſpect to the *inſtrument* (that is, the *contract of ſale*) is of no importance.—Moreover, the advantage ſet forth by *Mohammed* is of no account; ſince no advantages are attended to excepting ſuch as are occaſioned by the contract of ſale; and the advantage in queſtion is not occaſioned by the contract.—All that is here advanced proceeds on a ſuppoſition that the price is a *money-debt*.—If, however, it conſiſt of any ſpecific article, ſuch as *cloth* for inſtance, both the parties are to be ſworn, according to all our doctors; becauſe, in this caſe, a ſubject of ſale ſtill exiſts, (ſince the price, where it conſiſts of any thing ſpecific, may be conſidered as the ſubject;) and upon both parties ſwearing, the ſale muſt be diſſolved; and the ſeller muſt return the price to the purchaſer; and the purchaſer muſt give a ſimilar in lieu of the ſubject of the ſale to the ſeller, provided it was of that kind of thing compenſable by ſimilars; or, if otherwiſe, he muſt pay the *value*.

Caſe of a diſpute concerning the price of two ſlaves, where one of them dies.

IF a perſon purchaſe two ſlaves by one contract, and one of them be afterwards deſtroyed, and a diſpute ariſe betwixt the parties concerning the amount of the price, the ſeller aſſerting that it was *two* thouſand *dirms*, and the purchaſer aſſerting that it was *one* thouſand, in this caſe (according to *Haneefa*) the parties are not to be ſworn; on the contrary, the aſſertion of the *purchaſer* muſt be credited. This, however, proceeds on the ſuppoſition of the ſeller being unwilling to receive the price of the *living* ſlave only, and to relinquiſh the price of the ſlave that is *dead*.—In the *Jama Sâgheer* it is related that, according to *Haneefa*, the aſſertion of the purchaſer is to be credited, unleſs the ſeller be willing to accept of the price of the *living* ſlave only.—*Aboo Yoosaf* alleges that both parties muſt be ſworn with regard to the *living* ſlave;—that the ſale, ſo far as relates to him, muſt be diſſolved;—that the aſſertion of the purchaſer muſt be credited with reſpect to the *dead* ſlave;—and that, therefore, the purchaſer is reſponſible for the proportion of the *dead* ſlave, and not for the *whole price*.—*Mohammed*, on the other hand, maintains that both parties muſt be ſworn with regard to *both* ſlaves; and that afterwards the purchaſer muſt return the living ſlave and the value of the dead one; becauſe, as (in his opinion) the deſtruction of *the whole* ſubject of ſale does not prevent the ſwearing of both parties, it follows that the deſtruction of *a part* only does not prevent it, *a fortiori*.—The reaſoning of *Aboo Yoosaf* is that as the obſtacle to the ſwearing of both is grounded only on the deſtruction of the ſubject of the ſale, it ought of courſe to operate only in the degree in which it may have been deſtroyed.—The reaſoning of *Haneefa* is that the ſwearing of both parties, although repugnant to analogy, is yet eſtabliſhed by the LAW,

Digitized by Google

in caſes where the ſubject of the ſale ſtill completely exiſts: but where a part of the ſubject is deſtroyed, it does *not* completely exiſt; becauſe the *complete* exiſtence of it ſuppoſes the exiſtence of *the whole*; and the *whole* cannot exiſt but by the preſervation of all its parts.—If, on the other hand, both parties ſhould ſwear with reſpect to the *living* ſlave only, it is evident that this cannot be effected, but by a reference to his particular value.—Now as both ſlaves are included under one price, the particular value of each cannot be known but by conjecture; and hence it appears that the ſwearing of both parties, under ſuch circumſtances, muſt be referred to ſomething *uncertain*; and this is illegal.—If, however, the ſeller be willing to relinquiſh his right to the deſtroyed ſlave, and to conſider him as having never exiſted, both parties may, in that caſe, be ſworn as to their denial of the claim of the other, reſpecting the whole price of both the ſlaves; becauſe the whole of the price is then oppoſed to the living ſlave, from the conceſſion of the ſeller to take the *living* ſlave only in lieu of the whole of the price, and to conſider the *dead* ſlave as excluded from the contract.—What is here advanced is agreeable to the expoſition of ſeveral of our modern doctors. They have alſo explained the meaning of the ſentence, in the *Jama Ságheer*, to be that the ſeller ſhall not abſolutely receive *any* thing for the dead ſlave; and they have connected the exception with the omiſſion of ſwearing of the parties.—Others of our modern expoſitors, however, have explained it to mean that the ſeller ſhall agree to take, as the price of the *dead* ſlave only, what the buyer may acknowledge, and nothing more; and they have connected the exception with the non-ſwearing of the *buyer* only.—Thus they have explained it to mean that the ſeller may take the *living* ſlave, without the neceſſity of the purchaſer's taking an oath, provided he be willing to take, for the dead ſlave, what the purchaſer may of himſelf acknowledge to have been his value.—The mode of ſwearing the parties, in this inſtance, (according to *Mohammed*,) is the ſame as in a caſe of non-exiſtence of the ſubject of the ſale.—If, therefore, both take an oath, and differ in their aſſertions,—and if one or both ſhould

Mode of ſwearing the parties in this inſtance.

require the diſſolution of the contract, the *Kázee* muſt, in that caſe, diſſolve it, and command the purchaſer to return the living ſlave, and the value of the dead one; and, in the determination of the value of the dead ſlave, the purchaſer's aſſertion muſt be credited.—There is, however, a difference of opinion among our modern commentators, in their expoſition of the doctrine of *Aboo Yooſaf*, with reſpect to the mode of ſwearing the parties, in this inſtance.—The moſt approved mode is, to tender an oath to the purchaſer that "he had not purchaſed "thoſe two ſlaves for the price claimed by the ſeller;"—and in caſe of his refuſal to take the oath, to confirm the claim of the ſeller: but if he ſwear accordingly, an oath muſt then be tendered to the ſeller, that "he did not ſell theſe two ſlaves for the price claimed by "the purchaſer;" and if he ſhould refuſe to take it, the claim of the purchaſer muſt be confirmed: but if he ſwear accordingly, the ſale (ſo far as it relates to the *living* ſlave) muſt then be diſſolved, and the purchaſer muſt be reſponſible for the price of the *living* ſlave.—In proportioning the reſpective prices of the two ſlaves, regard muſt be had to the value they bore on the day in which the purchaſer took poſſeſſion of them. If the parties ſhould diſagree as to the value the *dead* ſlave bore on the day of delivery, the bare aſſertion of the *ſeller* is to be credited in preference to that of the *purchaſer*. If, however, either of the parties produce evidence, it muſt be admitted in preference to the other's aſſertion; and if both ſhould produce evidence, that of the *ſeller* muſt be admitted.—This is agreeable to the analogy ſet forth and exemplified in a caſe recited in the *Mabſoot*; and which is as follows.—If a perſon, having purchaſed two ſlaves by one contract, and taken poſſeſſion of them both, ſhould afterwards return one of them on account of a *defect*, and the other ſhould then die in his poſſeſſion, in that caſe he muſt pay the price of the ſlave that died; and he becomes exempted from the price of the other that he returned:—and, in proportioning their reſpective prices, regard muſt be had to the value of each on the day in which the purchaſer obtained poſſeſſion of them.—If the parties ſhould diſagree concerning the value of the *dead* ſlave, the

aſſertion of the ſeller muſt be credited, as he is the *defendant* or *reſpondent*, ſince both parties admit that a price is due, and the purchaſer, proceeding on his aſſertion of the inferior value of the ſlave that is dead, pleads that he has only a *ſmall* ſum to pay, which the *ſeller*, aſſerting the ſuperior value of the dead ſlave, *denies*.—If both parties adduce evidence, the evidence of the *ſeller* muſt be credited, as it proves moſt, ſince it proves the ſuperior value of the dead ſlave.—The reaſon of this is that, in oaths, regard is had to the *reality*; becauſe, as the oath of each oppoſes that of the other, and as they both know the real ſtate of the caſe, it follows that the foundation of the oath reſts upon the real ſtate of the caſe; and as the ſeller is the *real* defendant, his oath muſt therefore be credited. In *evidence*, on the other hand, regard is had to *appearance*; becauſe, as the witneſſes are not acquainted with the *real* ſtate of the caſe, with reſpect to them, that muſt be credited which is *apparent*; and the ſeller is apparently the *plaintiff* in this inſtance, ſince he claims a greater quantity of price for the dead ſlave. The evidence, therefore, produced by him muſt alſo be admitted in preference, ſince it has a ſuperiority, becauſe of its exceſs of probability.—From this explanation we may collect the principle on which *Aboo Yooſaf* has grounded his doctrine, that "the aſ-
"ſertion of the ſeller is to be admitted with reſpect to the amount of
"the price of the dead ſlave, and the evidence adduced by him muſt
"be preferred, in caſe of the parties continuing to diſagree with
"reſpect to the price of the ſaid ſlave after they have both been
"ſworn."

Caſe of a diſagreement concerning the *price*, in the diſſolution of a contract of ſale, after delivery of the *ſubject* of it.

If a perſon purchaſe a female ſlave, and take poſſeſſion of her, and the parties afterwards agree to diſſolve the ſale, but diſagree concerning the price, in this caſe they muſt be both ſworn; and after the ſwearing of them both, the original ſale reverts, and the diſſolution becomes void.—It is to be obſerved that the ſwearing of both parties, in the diſſolution of a ſale, is not founded on the ſacred writings, ſince the ordinance there reſpects a caſe of *abſolute ſale*, and *ſale* ceaſes to exiſt, in caſe of a diſſolution, for the diſſolution is a *breaking off* of the ſale with reſpect to the parties.—The ſwearing of the parties, therefore, in this inſtance, proceeds upon analogy; becauſe the example under conſideration proceeds upon a ſuppoſition of the ſeller not having received back the article after the diſſolution, in which caſe the ſwearing of the parties is not *repugnant* to analogy, but rather *agreeable* to it.—It is on this ground that we determine upon a caſe of *hire*, from its analogy to a caſe of *ſale before ſeizin*; (as where, for inſtance, a *leſſor* and *leſſee* diſagree with regard to the object of their contract, prior to the expiration of the leaſe;—in which caſe both parties are ſworn, becauſe of the analogy this bears to a caſe of ſale, prior to the receipt of the goods by the purchaſer:)—and alſo, that we determine with reſpect to the *heir* of a contracting party from the analogy his ſituation bears to that of the contracting party himſelf; (as where the heir of a *purchaſer* and the heir of a *ſeller* diſagree,—in which caſe they muſt both be ſworn, in the ſame manner as the *purchaſer* and the *ſeller* would have been.)—It is upon the ſame ground, alſo, that we determine the *value* of an article to be analogous to the *ſubſtance* of it, in caſe of the deſtruction of the ſubject of the ſale whilſt in the poſſeſſion of the ſeller by ſome other perſon than the purchaſer; (as where, for inſtance, another perſon *kills* the ſubject of the ſale *, whilſt yet in the hands of the ſeller, delivery not having been made to the purchaſer;—in which caſe the ſlayer muſt pay the *value*, which then ſtands as a ſubſtitute for the *ſubſtance* of the article ſold;)—whence, if the ſeller and the purchaſer diſagree concerning the price, they muſt both be ſworn, and the ſale diſſolved; and the *value* of the ſlave given to the ſeller; in the ſame manner as the *ſubſtance* would have been given, had it been extant.—It is to be obſerved, however, that if the ſeller receive the goods after a diſſolution of the contract, and the parties then diſagree concerning the price, they are not to be ſworn, according to *Haneefa* and *Aboo Yooſaf*.—*Mohammed* maintains that in this caſe alſo a *Tabáliſ*, or mutual oath, is tendered to the parties, becauſe here alſo (according to his tenets) the ſwearing is agreeable to analogy.

---

* Suppoſing it to conſiſt of a *ſlave* or *animal*.

Where the price has been paid *in advance*, and the parties agree to diſſolve the contract, but diſagree concerning the ſum advanced, the aſſertion of the *ſeller* muſt be credited.

If a perſon ſell a *Koor* [*] of wheat, by a *Sillim* contract, for ten *dirms*, and the parties afterwards agree to a diſſolution of the contract of *Sillim*, but diſagree concerning the *price*, in this caſe the aſſertion of the ſeller who has received the advance [†] muſt be credited: and the *Sillim* contract does not in this inſtance revert, the diſſolution ſtill continuing in force; becauſe *diſſolution*, in a caſe of *Sillim* ſale, is not merely a *breach* of the contract, but an *abrogation* of it, whence the *Sillim* contract cannot revert; (contrary to a diſſolution of a ſimple contract of *ſale*.)—Hence, if the price advanced conſiſt of goods, and the perſon who has received the advance wiſh to return them to the purchaſer on account of a defect, and the *Kázee* paſs a decree to that effect, with the conſent of both parties,—in that caſe, if the goods be deſtroyed prior to the return of them to the purchaſer, the contract of *Sillim* does not revert. A contract of *actual ſale* would however revert under ſuch circumſtances: and this caſe plainly ſhews that there is a difference between contracts of *ſale* and contracts of *Sillim*.

Caſes of diſagreement between a huſband and wife reſpecting the *dower*.

If a huſband and wife diſagree concerning the *dower* or *marriage ſettlement*, the huſband aſſerting that it was *one* thouſand *dirms*, and the wife that it was *two* thouſand, in this caſe the party that brings evidence muſt be credited, as this eſtabliſhes the plea of that party upon *proof*: and if *both* bring evidence, that adduced by the *woman* muſt be preferred, as it proves moſt.—This is where the woman's *Mihr Miſl*, or *proportionable* dower, falls ſhort of what ſhe claims.—

---

[*] About 7,100 lb. weight, or twelve camel-loads.

[†] Arab. *Mooſlim-ali-bee*, meaning the *ſeller*, or perſon to whom the price has been advanced.

If, however, neither of the parties produce evidence; they are to be ſworn, (according to *Haneefa:*) but the contract is not diſſolved; becauſe the only effect of the ſwearing, in this inſtance, is that it annuls the *bargain* with reſpect to the dower, in the ſame manner as if no bargain had ever exiſted; but this does not engender any doubt with reſpect to the *marriage itſelf*, ſince the dower is not an *eſſential*, but merely a *dependant* of the marriage *.—It is otherwiſe in a caſe of *ſale*, for there the annulment of the bargain, with reſpect to the price, deſtroys the contract, (as was before obſerved,) and the ſale is conſequently diſſolved.—In the caſe in queſtion, after the parties ſwearing, a *proportionable* dower muſt be adjudged to the woman.—If, on the other hand, the woman's proportionable dower, and the ſum acknowledged by the huſband, be *equal*, or if her proportionable dower *fall ſhort* of what he acknowledges, the *Kâzee* muſt, in that caſe, paſs a decree in favour of the huſband, as apparent circumſtances are on his ſide.—If the wife's proportionable dower be equal to what ſhe claims, or if it *exceed* her claim, the *Kâzee* muſt, in that caſe, paſs a decree in favour of her claim.—If the proportionable dower be *greater* than what is acknowledged by the huſband, and *leſs* than what is claimed by the wife, the *Kâzee* muſt, in that caſe, adjudge a proportionable dower to the wife; becauſe, after the ſwearing of both parties, nothing is eſtabliſhed either *greater* or *leſs* than the *proportionable* dower, which is therefore a *mean*.—The compiler of the *Hedâya* obſerves that the doctrine here advanced, of *firſt* ſwearing both parties, and *then* adjudging the *proportionable* dower, is the doctrine of *Koorokhee*: and it proceeds on this principle, that under the exiſtence of a *ſtipulated* dower, no attention is paid to a *proper* or *proportionable* dower;—and as the mutual ſwearing of the parties is the means by which that is to be ſet aſide, the oaths are therefore tendered to the parties, in the *firſt* inſtance, in all the above caſes; that is, whether the *proportionable* dower be *equal* to, or *greater* than, the claim of the *wife*;

---

* See vol. I. p. 122.

or whether it be *equal* to, or *leſs* than, that of the *huſband*.—In the opinion of *Haneefa* and *Mohammed*, the oath is firſt to be adminiſtered to the huſband, in order that the advantage ariſing from his declining to ſwear may be quickly obtained; for, as it is his buſineſs firſt to advance the dower, he muſt be firſt ſworn,—in the ſame manner as, in a caſe of ſeller and purchaſer, the purchaſer is firſt ſworn.—The expoſition of *Râzee* is, however, different; but as that, as well as the diſagreement of *Aboo Yooſaf*, have been particularly explained under the head of *marriage*, it is not neceſſary to repeat them.

If a huſband and wife diſagree concerning the dower,—the huſband aſſerting that he had agreed to give a particular *male* ſlave, and the wife aſſerting that he had aſſigned a particular *female* ſlave,—in this caſe the rule holds the ſame as in that immediately preceding; that is, if the woman's *proper* dower be equal to, or greater than, the value of the *male* ſlave, the *Kâzee* muſt adjudge in favour of the *huſband*; but if it be *equal* to, or *greater* than, the value of the *female* ſlave, the *Kâzee* muſt decree in favour of the *wife*.—The only difference between this caſe and the preceding, is that if the female ſlave and proportionable dower be equal in point of value, the wife is, in that caſe, entitled to the *value*, and not to the *ſlave ſubſtantially*; becauſe ſhe cannot poſſeſs the ſlave without the conſent of her huſband, which ſhe is not, in this inſtance, ſuppoſed to have obtained.

Caſe of a diſpute between a *leſſor* and *leſſee*, concerning the rent, or the extent of the leaſe, *before* delivery of the ſubject.

If a *leſſor* and *leſſee*, before enjoyment of the object of the contract, (that is, before the *uſufruct* of it,) diſagree concerning the amount of the *rent*, or the extent of the *leaſe*, they muſt in that caſe be both ſworn; and after ſwearing, the contract muſt be diſſolved, and each party muſt return to the other whatever he may have received.—The reaſon of this is that the ſwearing of both parties, with regard to *ſale*, in caſe of a diſagreement prior to the purchaſer's ſeizin of the goods, is conformable to analogy, as has been already demonſtrated.—Now a leaſe

Digitized by Google

leaſe prior to the enjoyment of the uſufruct, is ſimilar to a ſale prior to ſeizin of the ſubject; (and ſuch is the caſe here conſidered.)—If, therefore, the parties diſagree concerning the *amount of the rent*, the oath muſt be firſt adminiſtered to the *leſſee*, as he denies the obligation of the *rent*.—If, on the other hand, they diſagree concerning the extent of the ſubject of the leaſe, the oath muſt be firſt adminiſtered to the *leſſor*.—If either of them refuſe to take the oath, the claim of the other is thereby eſtabliſhed.—If one of them produce evidence, *his* claim is eſtabliſhed; but if *both* bring evidence, that adduced by the *leſſor* muſt be preferred, in caſe of the diſagreement relating to the quantity of the rent; and that of the *leſſee*, in caſe of its relating to the extent of the leaſe.—If they diſagree in *both* points, the evidence of each is in that caſe to be credited, in the exceſs which it may prove.—For inſtance; the leſſor claims the leaſe to have been made for a period of *one month*, in exchange for *ten dirms*, and the leſſee claims a period of *two months* in exchange for *five dirms*; in which caſe the *Kázee* muſt adjudge it to be for a period of two months in exchange for *five dirms*.

Caſe of the ſame nature, *after* delivery of the ſubject.

IF a leſſor and leſſee diſagree, *after* the receipt of the object of the leaſe, the parties are not to be ſworn, but the aſſertion of the *leſſee* muſt be credited, according to all our doctors:—according to *Haneefa* and *Aboo Yooſaf*, evidently, becauſe (in their opinion) the deſtruction of the object of the contract is a bar to the ſwearing of the parties:—and, in the ſame manner, according to *Mohammed*, becauſe his tenet, that the deſtruction of the object is not a bar to the ſwearing of both parties, relates only to the object of a *ſale*, and is founded on a principle that the object of a ſale may be conſidered as *price*, and the ſwearing of both parties (that is, of the buyer and the ſeller) is with relation to the *price*;—if, therefore, the rule of ſwearing *both* parties were admitted in the caſe in queſtion, and the contract were afterwards to be annulled, it muſt neceſſarily follow that the object of the leaſe could not be conſidered as *price*; becauſe the object of the leaſe is

Digitized by Google

uſufruct or *advantage*; and advantage is not in itſelf *price*, and cannot be conſidered as ſuch but from the contract; and, in the caſe in queſtion, it becomes evident that there is no contract.—Now ſince in this caſe it is impracticable to ſwear both parties, the aſſertion of the leſſee is therefore credited, as he is the defendant and denier.—If, on the other hand, the leſſor and leſſee diſpute after the receipt of *part* of the object of the leaſe, they muſt be both ſworn, and the contract diſſolved with regard to what remains.—With reſpect to what is *paſt*, in this inſtance, the aſſertion of the *leſſee* muſt be credited; becauſe a leaſe is contracted anew *every moment*, in proportion to the progreſs of the uſufruct.—Thus a new contract is oppoſed to every individual particle of advantage or uſufruct.—It is otherwiſe in a caſe of *ſale*, as a contract of ſale is oppoſed to the whole of the ſubject of it; for which reaſon a ſale, whenever it becomes obſtructed or impracticable in *part*, is held to be impracticable in the *whole*.

Caſe of a diſpute concerning *ranſom*.

If a maſter and his *Mokâtib* diſagree concerning the amount of the ranſom, according to *Haneefa* they muſt not be ſworn.—The two diſciples are of opinion that they muſt be ſworn, and that the contract of *Kitâbat* muſt be afterwards diſſolved; (and ſuch alſo is the opinion of *Shafeï*;) becauſe the contract of *Kitâbat* is a contract of *mutual exchange*, and is capable of diſſolution:—the caſe in queſtion, therefore, reſembles a caſe of *ſale*, ſince the maſter claims an exceſs of ranſom, which the *Mokâtib* denies; whilſt, on the other hand, the *Mokâtib* claims his title to freedom, on his payment of the ranſom agreeable to his ſettlement of it; and this the maſter denies:—they are both, therefore, in ſome meaſure plaintiffs, and alſo both defendants, as in a caſe of ſale; and hence they muſt both be ſworn, in the ſame manner as a purchaſer and ſeller are both ſworn when they differ concerning the price.—The argument of *Haneefa* is that the ranſom is oppoſed to the removal of a reſtriction, which operates inſtantaneouſly with reſpect to the ſlave; but that it is not conſidered as oppoſed to the *freedom* until the *Mokâtib* actually pay it.—Nothing remains,

mains, therefore, but a diſagreement with reſpect to the amount of the *ranſom*; and with reſpect to *that* the maſter is a *plaintiff* only, and the *Mokâtib* only a *defendant*, (the *plea* and the *defence* not exiſting alike in *both* parties, as in ſome of the caſes before recited:)—the parties, therefore, are not ſworn; but the aſſertion of the *Mokâtib*, upon oath, muſt be credited.

In a diſpute between a huſband and wife concerning *furniture*, the article in diſpute is adjudged to the party to whoſe uſe it is adapted.

IF a huſband and wife diſagree concerning any article of furniture, each claiming a right in it, in that caſe, if the furniture in queſtion be particularly adapted to the uſe of *men*, it is adjudged to the *huſband*; and if particularly adapted for the uſe of *women*, is adjudged to the *wife*; becauſe, in the *former* inſtance, probability is an argument in favour of the *huſband*; and in the *latter*, in favour of the *wife*. If, however, the article be of ſuch a nature as is common to the ſervice of *both*, (ſuch as a *pot*, or other veſſel,) it is in that caſe adjudged to the *huſband*; becauſe the wife herſelf, and every thing belonging to her, is in the poſſeſſion of the huſband; and, in *claims*, the aſſertion of the *poſſeſſor* is preferred. This rule, indeed, does not hold good where the article in diſpute is peculiarly adapted to the ſervice of *women*; for, although ſuch articles alſo are in the poſſeſſion of the huſband, yet the probability of their being the property of the *wife*, from the particular nature of them, is ſtronger than the argument derived from poſſeſſion, and therefore ſuperſedes it.—What is here advanced proceeds upon a ſuppoſition of the actual exiſtence of the marriage; or of a ſeparation between the parties, in which caſe the law is exactly the ſame.—If, on the other hand, one of the parties ſhould die, and the heirs of the deceaſed enter into a contention with the ſurvivor concerning the family goods, in that caſe the goods in queſtion are adjudged to the ſurvivor, whether they be of a nature adapted to the ſervice of a man or woman; ſince poſſeſſion is clearly eſtabliſhed in favour of the *living* party.—This is according to *Haneefa*.—*Aboo Yooſaf* maintains that every thing which partakes of the nature of *paraphernalia*,

If the diſpute be between the ſurvivor and the heirs of the deceaſed, the article muſt be adjudged to the *ſurvivor*.

nalia *, whether it be reſtricted to the uſe of a *man* or *woman*, muſt be adjudged to the *wife*; and that all the reſt muſt be adjudged to the huſband upon his ſwearing to the property;—becauſe, as every woman is ſuppoſed to have brought a paraphernalia along with her, there is a probability that the ſpecified articles may have been included in it; and this probability deſtroys the argument in favour of the huſband from poſſeſſion; but with reſpect to the reſt of the family goods, the huſband's claim, from poſſeſſion, holds good, as there is nothing preventive or deſtructive of it.—*Mohammed* alleges that whatever is only fit for the uſe of a *man* ought to be adjudged to the *huſband*; that whatever is only fit for *women* ought to be adjudged to the *wife*; and, that whatever is, in point of uſe, common to *both*, ought to be adjudged to the huſband or his heirs, for the reaſon alleged by *Haneefa*.

If one of the parties be a *ſlave*, it muſt be adjudged to the party who is *free*.

If, in the caſe in queſtion, one of the parties be a ſlave, and the contention concerning the property happen during the life of *both*, it muſt be adjudged in favour of the party who is free; becauſe the ſeizin of a free perſon is in a ſuperior degree valid;—but in caſe of the death of either, it muſt be adjudged to the *living* party, as the poſſeſſion of the deceaſed exiſts no longer, and the poſſeſſion of the living then remains unoppoſed.—This is according to *Haneefa*.—The two diſciples maintain that a privileged ſlave and a *Mokátib* are equivalent to *freemen* in this point, as their poſſeſſion is valid in conteſted caſes.

---

* Arab. *Jaheez*.—Meaning veſtments or furniture of any kind which a bride brings to her huſband's houſe.

SECTION.

SECTION.

Of PERSONS *who are not liable to* CLAIMS.

A perſon is not liable to a claim, who ſets up a plea of *depoſit*, *pledge*, or *uſurpation*, (in the article claimed,) ſupported by the teſtimony of witneſſes, unleſs he be a perſon of notoriouſly bad character.

IF a defendant plead that "a certain abſent perſon had depoſited " with him the article in diſpute," or "had *pledged* it to him," or that "he himſelf had uſurped it from a particular abſent perſon," and bring witneſſes to prove his allegation, in that caſe no room for ſuit or contention exiſts between him and the plaintiff; and ſo alſo, if he plead that "a certain abſent perſon had let the ſaid thing to him " in leaſe," and produce evidence in proof of it;—becauſe in all theſe caſes it is clearly eſtabliſhed by the evidence of the witneſſes of the defendant that his *tenure* is not the ſubject of contention, ſince he is ſeized of the thing in the manner of a *truſt*.—*Ibn Shabirma* maintains that the defendant is not exonerated from the ſuit in conſequence of proving, by witneſſes, the depoſit, the pledge, the uſurpation, or the leaſe; becauſe the proof of the abſentee's right of property is impracticable, ſince there is no perſon in his behalf to appear as a party in the ſuit; and the exoneration of the defendant from the ſuit of the plaintiff depends on the proof of the abſentee's right of property.—Our doctors, on the other hand, argue that the evidence here adduced has two objects in view:—FIRST, the eſtabliſhment of *the abſentee's right of property*, concerning which there is no ſuitor on his behalf; and which conſequently cannot be proved:—SECONDLY, a repulſion of the claim of the plaintiff; and as he is the immediate adverſary in this concern, the repulſion is conſequently eſtabliſhed.—The plaintiff in this inſtance, therefore, reſembles a perſon commiſſioned by a huſband to remove his wife:—that is to ſay, if a perſon appoint another his agent for the removing and conducting of his wife to him, and the wife prove, by witneſſes, that her huſband had divorced her, in this caſe

Digitized by Google

caſe the teſtimony of theſe witneſſes muſt be admitted; merely ſo far, however, as to reſtrain the removal of her by the agent; but not with reſpect to the eſtabliſhment of the proof of the divorce; (as was formerly mentioned *;) and ſo alſo in the caſe in queſtion.—It is to be obſerved that the defendant, in this caſe, is not exonerated from the claim of the plaintiff upon his bare *allegation* of the depoſit of the abſentee, or of his pawn, &c. nor until he produce evidence in ſupport of his aſſertion; becauſe the defendant is himſelf apparently an *adverſary* †, in contemplation of his being poſſeſſed of the ſubject of the claim; and is oppoſed by the ſuit of the *plaintiff*, which he means to repel by the declaration above mentioned;—his declaration, therefore, cannot be admitted, unleſs he adduce evidence in ſupport of it; in the ſame manner as where a perſon ſays to his creditor "I have tranſ"ferred the debt I owe you upon another perſon," in which caſe his aſſertion is not believed unleſs ſupported by evidence.—*Ibn Abee Leilee* is of opinion that the defendant is exempted from the plea, immediately upon his aſſertion.—The *laſt* recorded opinion of *Aboo Yooſaf* is that if the defendant be virtuous and not noted for fraud, the rule obtains as above laid down.—If, however, he be noted for fraud, he in that caſe is not exonerated from the claim, even on producing evidence in ſupport of his allegation; for a fraudulent perſon ſometimes gives property that he has uſurped to a traveller (for inſtance) in order that the traveller may afterwards, in the preſence of witneſſes, reſign it to him in *truſt*; and this he does with a view of defrauding the original proprietor of his right.—Where the defendant, therefore, is open to a ſuſpicion of ſuch frauds as theſe, the *Kâzee* muſt not accept of his evidence.—If the defendant's witneſſes ſhould ſay "a perſon whom "we do not know did reſign this article to him in truſt;" in that caſe the defendant is not releaſed from the ſuit, for two reaſons.—First, there is a poſſibility that that perſon may be the *plaintiff himſelf*.—

or, that his witneſſes bear defective teſtimony.

---

* Under the head of *Divorce*.

† That is, he may himſelf be regarded (in one view) in the light of a *plaintiff*.

SECONDLY, If they had ſpecified the perſon, the plaintiff would then have had it in his power to have traced him, and to have entered a ſuit againſt him; but as they have not ſpecified him, he is deprived of the power of tracing him; and if, under ſuch circumſtances, the defendant were releaſed from the claim, an injury is thereby occaſioned to the plaintiff.—If, again, the witneſſes ſhould ſay "we know the "*face* of the man in queſtion, but we are ignorant of his *name* and "*family*," in that caſe the ſame rule obtains, (according to *Mohammed*;) becauſe of the *ſecond* reaſon.—According to *Haneefa*, on the contrary, the defendant in this caſe is releaſed from the claim, as having proved that the thing in queſtion came to him from another in truſt; ſince, as the witneſſes know the *countenance* of the man, (contrary to the *preceding* caſe,) the defendant's poſſeſſion is conſequently no longer a ſubject of litigation.—In reply, alſo, to what is urged by *Mohammed*, it may be obſerved that either the plaintiff has been himſelf the occaſion of the injury he ſuſtains, in forgetting the defendant; or, the injury has been occaſioned by the *witneſſes* of the defendant; but not by the defendant *himſelf*.—(This caſe is termed the *Makhamſa*, or *quinqual*, of the book of *pleas*; becauſe it has given riſe to five different opinions, as here ſtated.)

He is liable, if he ſet up a plea of *right of property*:

IF a defendant plead that he had *purchaſed* the article in diſpute from a certain abſentee, he is in that caſe a party, and liable to anſwer to the claim of the plaintiff; for in declaring that he was ſeized of the thing in virtue of a *right of property*, he acknowledged himſelf to be ſubject to the ſuit of the plaintiff.

or, if the plaintiff ſue him on a plea of *theft*, or *uſurpation*, although he produce evidence to prove a *truſt*;

IF, in a ſuit, the plaintiff ſhould ſay to the defendant "you have "*uſurped* this thing from me," or "you have *ſtolen* this thing from "me," in this caſe the defendant is not releaſed from the claim, although he produce witneſſes in proof of the article in queſtion having been committed to him by an abſentee in *truſt*; becauſe here the plaintiff aſſerts the action of uſurpation or of theft againſt him, and in this reſpect (and not becauſe he is *ſeized of the property*) he is ſubject to the plea.—It is different where the plaintiff aſſerts abſolutely his *right of property*; becauſe in that caſe the defendant cannot be ſubjected to the claim otherwiſe than from his poſſeſſion of the thing: whence it is that an abſolute claim of property in an article is not admitted againſt any except the *actual poſſeſſor* of the article; whereas a plea for the act [of acquiſition, ſuch as *uſurpation*, and ſo forth] lies againſt any other perſon.

and ſo alſo, if the plaintiff ſue upon a plea of theft, without ſpecifying the *thief*:

If, in a ſuit, the plaintiff ſhould ſay to the defendant, who is ſeized of the thing in diſpute, "this thing which is in your poſſeſſion "is my property, and has been taken from me by *theft*;" and the defendant ſay "a certain abſentee depoſited this thing with me;" and bring evidence to prove his aſſertion, ſtill he is not releaſed from the claim.—This is the opinion of *Haneefa* and *Aboo Yooſaf*; and proceeds upon a favourable conſtruction of the law. *Mohammed* holds the defendant, in this caſe, to be exempted from the claim, as the plaintiff has not exhibited the claim of theft againſt *him*, but againſt an *unknown perſon*; and as a claim of this nature againſt an *unknown perſon* is nugatory, it follows that the claim, with reſpect to the *act*, cannot ſtand:—nothing, therefore, remains except a claim with reſpect to the *right of property*; and as, in a claim concerning a *right of property*, the ſuit is ſet aſide, by the defendant proving the article in diſpute to have been committed to him in *truſt*, the caſe is therefore the ſame as if the plaintiff had declared the thing to have been taken from him by *uſurpation*, without naming the uſurper.—The reaſoning of *Haneefa* and *Aboo Yooſaf* is that the mention of the *act* involves a plea againſt the *agent*; and the preſumption is that the poſſeſſor is the agent, but that the plaintiff, from motives of tenderneſs, may not have ſpecified him, in order to ſcreen him from puniſhment. The caſe is, therefore, the ſame as if the plaintiff had ſaid "you have "ſtolen this thing.—It is otherwiſe where the plaintiff charges the defendant with *uſurpation*, for in this caſe, although he make the charge in direct terms, ſtill puniſhment is not incurred, notwithſtanding it be evident that his deſign is to prove the uſurpation.

but not if the plaintiff ſue him on a plea of *purchaſe*.

If the plaintiff ſhould ſay to the defendant "I have *bought* this "thing from a certain perſon," and the defendant reply "that perſon "conſigned the thing to me in *truſt*," in this caſe the defendant is exempted from the claim without the neceſſity of producing evidence; becauſe both the plaintiff and the defendant are agreed that the thing is, originally, the property of another man; and conſequently the tenure of the perſon ſeized of it is not a matter of diſpute between them.—If, however, the plaintiff ſay that "a certain perſon had ap-"pointed him an agent for ſeizin of the ſaid thing," and produce evidence in proof of this, he is entitled to proſecute his ſuit againſt the poſſeſſor, as having eſtabliſhed, by witneſſes, a ſuperior right to the poſſeſſion of the article in queſtion.

CHAP. IV.

Of Things claimed by two Plaintiffs.

If the claim be laid to a thing of a *diviſible* nature, and the proofs on each part be equal, the thing muſt be adjudged equally between both claimants.

If two men ſeparately claim the property of an article in the poſſeſſion of another, and each bring evidence in ſupport of his claim, the *Kázee* muſt, in that caſe, adjudge the article to be the joint property of both in an equal degree.—One opinion of *Shafeï*, in this caſe, is that, as the evidence reſpectively adduced by the parties is contradictory of each other, they muſt both be rejected.—Another opinion of his is that the *Kázee* ought to throw the die to determine to whom the property belongs.

Digitized by Google

longs.—His reaſoning in ſupport of theſe opinions is that as it is an impoſſibility that two men can each have ſeparately a complete right of property to one and the ſame thing, it follows that the evidence of *one* of the parties muſt be falſe; but as there is no criterion by which the truth can be determined, it is therefore proper either to reject *both*, or to have recourſe to the die; more eſpecially as the prophet in a ſimilar caſe cauſed the die to be thrown, and gave judgment accordingly. The arguments of our doctors on this point are twofold. First, a tradition reported by *Tameem Bin Tirſa*, that the prophet, in a cauſe which was brought before him regarding a *camel*, in which both parties brought evidence in ſupport of their claim, adjudged it to be the joint property of both: (for, with reſpect to the tradition quoted by *Shafei*, it alludes to a deciſion of the prophet in the infancy of the *Muſſulman* religion, which was afterwards diſapproved of.)—Secondly, it is poſſible to reconcile the evidence of *both* the parties, by ſuppoſing the evidence of the one party to allude to the *cauſe* of right of property in the poſſeſſor, and that of the other to the *right of poſſeſſion:* and as, by this hypotheſis, the evidence of each of the parties is reconcileable to truth, it is therefore incumbent to act according to it in the greateſt poſſible degree,—namely, by adjudging *each* of them to have a right to the half of the property.

If it be to a *wife*, the right muſt be adjudged according to *her* declaration:

or, (if the witneſſes ſpecify *dates*) according to the prior date.

If two men, ſeverally, claim marriage with one woman, and each adduce evidence in ſupport of his claim, the *Kázee* muſt not, in that caſe, paſs a decree upon theſe evidences; becauſe, as the ſubject of diſpute does not admit of *divided* property, it is conſequently impracticable to adjudge the half to each.—He muſt therefore have recourſe to the declaration of the *wife*, and adjudge her in marriage to that party whoſe claim ſhe verifies.—This, however, proceeds upon a ſuppoſition of the witneſſes not having mentioned any date; for if they ſhould ſpecify *dates* to the marriage, the evidence of that party which ſpecifies the moſt *ancient* date muſt be preferred.—If, on the other hand, previous to the adduction of evidence by either party, the woman ſhould make an acknowledgment in favour of one of the plaintiffs, ſhe is adjudged to be the wife of the acknowledged:—but if the other party ſhould afterwards produce evidence in ſupport of his claim, the *Kázee* muſt adjudge her to be *his* wife, as *evidence* is ſtronger than *acknowledgment.*

A decree adjudging a wife to a *ſingle* claimant cannot be reverſed in favour of a *ſubſequent* claimant, unleſs his witneſſes prove a priority of date.

IF only *one* man claim marriage with a woman, and ſhe deny it, and he produce evidence in ſupport of his claim, and, the *Kázee* having in conſequence paſſed a decree in his favour, another perſon then appear and claim his marriage with the ſame woman, in this caſe the *Kázee* muſt not reverſe his decree; becauſe, having been paſſed on good grounds, it cannot afterwards be affected by a circumſtance of *equal*, and far leſs by one of *inferior* force.—If, however, the witneſſes of the *ſecond* plaintiff ſhould atteſt the date of the marriage to have been *prior* to that mentioned by the witneſſes of the *firſt* plaintiff, the evidence brought by the ſecond plaintiff muſt in that caſe be preferred, as the error of the firſt witneſſes has thereby been made apparent.—The law is the ſame in a caſe where a huſband and wife living together, and their marriage being notorious, another perſon claims marriage with the woman, and brings evidence in ſupport of his plea; for in this caſe his evidence is not admitted unleſs it prove a marriage *prior* to that of the huſband with whom the wife then lives.

Two claimants to a ſlave, on a plea of *purchaſe*, upon his being adjudged between them, are ſeverally at liberty to pay half the price, or to relinquiſh the bargain:

IF two men ſeverally claim a right of property in a ſlave in the poſſeſſion of another, (as if each were to aſſert that he had *purchaſed* him from that other,) and each bring evidence in ſupport of his claim, in that caſe, (as the *Kázee* muſt adjudge him to be the joint property of both,) they are ſeverally at liberty either to take the half of the ſlave at the half of the price or relinquiſh the bargain.—The caſe is therefore the ſame as where two unauthorized perſons ſell the ſame article belonging to a *third* perſon to two different men, and the proprietor confirms both ſales, in which caſe each purchaſer is at liberty either to

take

Digitized by Google

take the half of the article for half the ſtipulated price, or to reject the ſale entirely and receive back his money; becauſe, as he had before aſſented to the bargain, on the ſuppoſition of its extending to the *whole* of the article, it cannot be inferred that he aſſented to the *partial* bargain; he is therefore at liberty either to accept or reject it as he pleaſes. If, however, in the caſe in queſtion, after the *Kâzee* adjudging the half to each, one of the parties ſhould reject it, the other cannot take the *whole*, becauſe that half was adjudged to the other in conſequence of evidence he produced, and on his rejecting it the ſale becomes, in that half, null and void.—It were otherwiſe, however, if one of the parties ſhould intimate his rejection of the half *prior* to the adjudication of the *Kâzee*, for in that caſe he would be entitled to take the whole, becauſe his claim went to a right to the whole from purchaſe, and as the bar to his obtainment of the *whole* (namely, the *plea of the other*) is removed by the relinquiſhment of the co-plaintiff, prior to the virtual annulment of any part of the ſale by the decree of the *Kâzee*, he is conſequently entitled to the whole of his claim. (Analogous to this is the reſignation made, by one of two *Shafees*, of his right of pre-emption, prior to the determination of the *Kâzee* in favour of *both*.—Analogous, alſo, to the *firſt* ſtatement is that of the reſignation made by one of two *Shafees* of his right of pre-emption *ſubſequent* to the decree of the *Kâzee* in favour of both *.)—It is to be obſerved that if, in the caſe in queſtion, the two plaintiffs ſhould ſpecify the *dates* of their purchaſe, the ſale muſt be adjudged in favour of the prior purchaſer; becauſe it appears that he had eſtabliſhed his right at a time when he had no opponent; and on this account the ſubſequent claim of the other is invalid.—If *one* of the parties ſhould mention a date, and not the *other*, the ſale muſt in that caſe be adjudged in favour of the one who ſpecifies the date; becauſe he clearly eſtabliſhes his claim at a particular time; and as the other does not ſpecify any period, it becomes, of conſequence, doubtful whether he purchaſed it *prior* or *poſterior* to the

but if they ſpecify and prove *dates*, the ſlave muſt be adjudged to the prior purchaſer.

---

* This is fully explained under the article *Shaffa*.

the particular time mentioned by the other; and the *Kâzee* (becauſe of this doubt) cannot paſs a decree in his favour.—If neither of the parties ſpecify a date, and one of them be in poſſeſſion of the thing, the claim of the *poſſeſſor* is preferable; becauſe it is probable that his right of poſſeſſion was derived from *prior purchaſe*; and alſo, becauſe both of their claims being eſtabliſhed in an equal degree, the poſſeſſion, which is undiſputed, cannot be affected by a matter of *doubt*. The ſame rule obtains when one of the plaintiffs is ſeized of the thing, and the witneſſes of the other ſpecify the date of his purchaſe.—But it is to be obſerved that if the witneſſes ſhould expreſsly atteſt *his* purchaſe to have been *prior* to that of the purchaſe of the *poſſeſſor*, the ſale muſt in this caſe be adjudged in his favour; as a certain knowledge of prior purchaſe eſtabliſhes a *poſitive* right, whereas poſſeſſion eſtabliſhes only an *implied* right.

Where one party pleads *purchaſe*, and the other *gift* and *ſeizin*, (without ſpecifying dates,) the article muſt be adjudged to the *purchaſer*.

IF two men claim a particular article, one in virtue of *purchaſe*, and the other in virtue of *gift* and *ſeizin*, and each produce evidence in ſupport of his claim, without, however, mentioning *dates*, in this caſe the evidence to the *purchaſe* muſt be admitted in preference; becauſe *purchaſe* is ſtronger in its nature than *gift*, as it involves a mutual exchange; and alſo, becauſe purchaſe is *in itſelf* a cauſe of a right of property; whereas the right of property in a *gift* reſts upon the *acceptance*.—If the claim of the one be founded upon *purchaſe*, and that of the other upon *charity* and *ſeizin*, and all the other circumſtances be the ſame as above ſtated, the ſame rule holds, becauſe of the reaſons aforeſaid. If, however, the claim of one be founded upon *gift* and *ſeizin*, and that of the other upon *charity* and *ſeizin*, the *Kâzee* muſt in this caſe decree the thing to be in an equal degree the joint property of both; ſeeing that their claims are equal, and that neither has a preference over the other.

OBJECTION.—A preference ought to be given to the claim of *charity* over that of *gift*; becauſe a *gift* is not *binding*, ſince the giver

Digitized by Google

giver may *retract* the gift; whereas *charity* is binding, and cannot be retracted.

Reply.—No preference is given excepting for ſome effect immediately operating; and the legality of retracting a gift, and the illegality of retracting charity, relate to the *future*; but at the moment they are on a foot of equality.—It is to be obſerved that this doctrine of the equality of claims of *gift* and of *charity*, and of the neceſſity for decreeing jointly to both, is when the thing in queſtion is capable of diviſion. But if the thing be incapable of diviſion, there is a difference of opinion; ſome maintaining that the law in this caſe is the ſame; and others maintaining that the law in this caſe is different, as it induces *a gift* with reſpect to *indefinite* property, which is unlawful.

A claimant on a plea of *purchaſe*, and a claimant on a plea of *marriage*, are upon an equal footing.

If two perſons lay claim to the ſame thing, *one* of them in virtue of *purchaſe*, and the *other* (being a *woman*) in virtue of the poſſeſſor's having married her, and having ſettled that article as her dower,—in this caſe both plaintiffs are upon an equal footing; becauſe the claim of each in point of ſtrength is equal, ſince a contract of purchaſe, and of marriage, are both contracts of exchange, and both equally occaſion a right of property.—This is according to *Haneefa* and *Aboo Yooſaf*. *Mohammed* maintains that the plea of *purchaſe* is to be preferred, and that the huſband muſt be made reſponſible to the woman for the value of the article in diſpute; as by this means a preference is given to the plea of *purchaſe*, whilſt at the ſame time the claims of both are attended to.

A plea of *pawnage* and ſeizin is preferable to a plea of *gift* and ſeizin.

If one of two plaintiffs plead *pawnage* and *ſeizin*, and the other plead *gift* and *ſeizin*, and each produce evidence in ſupport of his plea, in this caſe the plea of *pawnage* muſt be preferred.—This proceeds upon a favourable conſtruction.—Analogy would ſuggeſt that the plea of *gift* ought to be preferred, becauſe gifts occaſion a *right of property*, whereas pawnage does not.—The reaſon for a more favourable conſtruction in this inſtance is that ſeizin in virtue of *pawnage* occaſions reſponſibility, which is not the caſe with reſpect to ſeizin in conſequence of *gift*; and a contract which occaſions *reſponſibility* is ſtronger than one which does *not* occaſion it.—It is different where the gift is made *in exchange for ſome other thing*; becauſe ſuch a gift is ultimately a *ſale*; and *ſale* is ſtronger than *pawnage*.

Two claims, equally ſupported, muſt be determined by the priority of date.

IF two men claim an abſolute right of property in the ſame article, which is in the poſſeſſion of a third perſon, and each mention the date of commencement of his right, it muſt in that caſe be adjudged in favour of him who pleads the oldeſt date;—becauſe having eſtabliſhed his prior right of property, it follows that no other can afterwards obtain that but from him; and the other plaintiff, in this inſtance, has not obtained the right of property from him.

Two pleas of *purchaſe*, preferred againſt *one* perſon, muſt alſo be determined by the oldeſt date.

IF two men prefer a claim of *purchaſe* againſt another who is not the poſſeſſor of the article in diſpute, and each bring evidence of his purchaſe, ſpecifying different dates, the perſon who proves the prior date muſt be preferred, as he proves his right at a period when he had no opponent.

If, againſt two different perſons, the article is adjudged equally between both claimants:

IF two claimants prefer an allegation of purchaſe, the one bringing evidence in proof of his having bought the article in diſpute from *Zeyd*, and the other bringing evidence in proof of his having bought it from *Omar*, and the witneſſes of each ſpecify the dates of theſe purchaſes, in this caſe both plaintiffs are on a footing of equality, as each of them has eſtabliſhed the right of property of his reſpective ſeller, and hence the caſe is the ſame as if the two *ſellers* were themſelves preſent and claimed their reſpective rights.—Each plaintiff, therefore, is at liberty to take the half of the thing at half of the price, or to relinquiſh his purchaſe entirely, for the reaſon before explained.

Digitized by Google

If the witneſſes of one of the parties ſpecify a determinate time of payment, and not the witneſſes of the other, ſtill the *Kázee* muſt adjudge one half to each; becauſe a knowledge of the length of credit does not imply priority in point of purchaſe;—nay, it is even probable that the other's right of property may have been of prior date, as the caſe ſuppoſes two different *ſellers*.—(It is otherwiſe where there is only *one* ſeller, as in that caſe both parties are agreed in the derivation of their right of property from one and the ſame ſeller.)—If, on the other hand, one of the plaintiffs prove a *date of purchaſe*, and not the other, a decree muſt be paſſed in favour of the claimant whoſe date of purchaſe is aſcertained, unleſs the purchaſe of the other can be proved to have preceded his.

unleſs *one* only adduce evidence to a *date*, when it muſt be adjudged to him.

Where four claimants plead a right in a thing, as derived from four different perſons, the article is adjudged among them in equal lots.

If one plaintiff claim a right to an article from his having purchaſed it from *Zeyd*,—a *ſecond*, from a gift of it to him by *Omar*,—a *third*, from inheritance from his father,—and a *fourth*, from its having been beſtowed upon him in charity by a particular perſon,—and each of the four claimants adduce evidence in ſupport of his claim, in this caſe the *Kázee* muſt adjudge the article among them, in four equal lots; becauſe each of them pleads his right, as derived from a different perſon, and the caſe is therefore the ſame as if theſe four different perſons had themſelves appeared in court, and each proved his abſolute right of property.

The evidence of the *poſſeſſor* muſt be preferred to that of the *plaintiff*, where it proves a prior date of right.

If a plaintiff adduce evidence to prove his right of property in a thing from a particular period, and the poſſeſſor of the thing adduce evidence to prove his right from a *prior* period, the evidence of the *poſſeſſor* muſt be preferred.—This is according to *Haneefa* and *Aboo Yooſaf*.—It appears alſo (from one tradition) to be the opinion of *Mohammed*.—According, however, to another tradition, *Mohammed* is of opinion that the evidence of the poſſeſſor ought not to be preferred; (and this is the ſentiment he adopted and acted upon;) becauſe, as each party produced evidence in ſupport of his abſolute *right of property*, without explaining the *cauſe* of that right, it follows that a priority or poſteriority of date is in this inſtance immaterial.—The reaſoning of *Haneefa* and *Aboo Yooſaf* is that wherever a perſon proves his right of property in a thing at a particular period, the right of property of another in that thing at a *ſubſequent* period cannot otherwiſe be eſtabliſhed than by its being derived from the *former*; but, in the caſe in queſtion, the plaintiff has not pleaded the derivation of his right of property from the poſſeſſor; and therefore the evidence of the poſſeſſor is preferred.

The evidence on the part of the *plaintiff* is preferred, where the claim is laid *abſolutely:*

IF a plaintiff and poſſeſſor, reſpectively, bring evidence to prove each his right of property, in an *abſolute* manner, (that is, without explaining the *inſtrument* or *cauſe* of it,) and the witneſſes of one of the parties declare the *date* of his right, and not thoſe of the other, in this caſe (according to *Haneefa* and *Mohammed*) the evidence of the plaintiff muſt be preferred.—*Aboo Yooſaf* alleges that the evidence of the claimant of known date muſt be preferred; (and this, according to one tradition, is alſo the opinion of *Haneefa*;)—becauſe the right of property of the claimant of known date is eſtabliſhed in the *paſt*, whereas that of the other, in conſequence of *his* evidence not mentioning any date, is only eſtabliſhed in the *preſent*; and the *paſt* has precedence of the *preſent*;—in the ſame manner as where one of two claimants from purchaſe proves the date of his purchaſe, and the other does not; in which caſe the evidence of the former is preferred.—The reaſoning of *Haneefa* and *Mohammed* is that the evidence adduced by the poſſeſſor of an article in diſpute is admitted only as it tends to *repulſion*;—but, in the caſe in queſtion, no property of repulſion exiſts, becauſe it is in this inſtance doubtful whether the plaintiff may have derived his right in the article from the poſſeſſor or not, ſince it is poſſible that if the *plaintiff*'s witneſſes were to mention a date, that date might prove to be *prior*:—the evidence adduced by the *plaintiff* is therefore preferred.

Digitized by Google

and the ſame, where the ſubject in diſpute is *immoveable property.*

A SIMILAR diſagreement ſubſiſts with reſpect to a conteſted houſe in the poſſeſſion of two plaintiffs: for, according to *Haneefa* and *Mohammed*, the houſe muſt be left in their poſſeſſion, as before, and no regard whatever paid to the evidence on either part; whereas, according to *Aboo Yooſaf*, a decree muſt be paſſed in favour of him who proves a date.—Suppoſing, however, the houſe to be in the poſſeſſion of a *third* perſon, and all the other circumſtances to be the ſame, in that caſe, according to *Haneefa*, both the claimants are upon an equal footing; whereas, according to *Aboo Yooſaf*, the evidence on the part of him who proves the date muſt be preferred.—*Mohammed*, on the other hand, alleges that the evidence on the part of him who does *not* ſhew any date muſt be preferred; becauſe he claims a prior right of property, on the ground that when a perſon claims property in an *abſolute* manner, without ſpecifying any date, and eſtabliſhes his claim, he is entitled to more than one who ſpecifies a date; as holds in a caſe of claim of acquiſition by labour.—The argument of *Aboo Yooſaf* is that the mention of a *date* is a certain corroboration of the claimant's right of property at that time; whereas the *omiſſion* of a date admits of two conſtructions, as it leaves it doubtful whether the right of the other had exiſted *prior* or *poſterior* to that period; and as *certainty* is always a cauſe of preference, he whoſe evidence goes to eſtabliſh a *date* is therefore preferred;—in the ſame manner as where two perſons claim the purchaſe of the ſame thing, and one of them ſpecifies the date and not the other.—The argument of *Haneefa* is that the date mentioned by the *dating* claimant bears the conſtruction either of *priority* or *poſteriority*, in the ſame manner as the claim of the other, which is *abſolute*, alſo bears two conſtructions: the claims of both are, therefore, on a footing of equality. It is otherwiſe in the caſe of two purchaſers, where one ſpecifies the date, and not the other; becauſe purchaſe being a *ſupervenient* circumſtance, is therefore, when doubtful, referred to the neareſt period; and hence, in that caſe, the reaſon for preferring the known date.

Digitized by Google

Caſe of claims to animals, founded upon *generation:*

IF a plaintiff and poſſeſſor ſhould both bring evidence to prove a *generation*, as if each ſhould bring evidence to prove that "ſuch a *camel* "(for inſtance) is the offſpring of a particular camel, which had "brought it forth whilſt in his poſſeſſion,"—in this caſe the claim of the *poſſeſſor* muſt be preferred; becauſe, as the evidence is adduced upon a point which derives no additional proof from *actual poſſeſſion*, it follows that the plaintiff and the poſſeſſor are both upon a perfect equality with reſpect to *plea* and *evidence*; and the evidence on the part of the poſſeſſor afterwards acquires a ſuperiority from the circumſtance of his *poſſeſſion:* the *Kâzee* muſt therefore adjudge the camel to him.—This is approved.—*Yeeſa Ibn Ayâm*, however, has aſſerted the contrary: for he maintains that as both evidences are in oppoſition to each other, they muſt both be rejected, and the camel left, as it was, in the hands of the poſſeſſor; but that it ought not to be decreed to him by the *Kâzee*.

IF, in a ſuit reſpecting a *horſe*, the plaintiff aſſert that he had purchaſed it from *Zeyd*, and that it was the offſpring of a horſe of *Zeyd*, and the poſſeſſor aſſert that he had bought it from *Omar*, and that it was the offſpring of a horſe of *Omar*'s, and each bring evidence in proof of the horſe having been produced from a dam in the poſſeſſion of the ſeller, it is the ſame as if each had adduced evidence in proof of the horſe having been produced in *his own* poſſeſſion. If, on the other hand, one of the parties bring evidence in proof of his *right of property*, and the other in proof of the contrary, in this caſe the claim of the party proving the generation of the horſe is preferred, whether he be the poſſeſſor or not; becauſe, as the evidence adduced by him goes to prove his right of property *ab initio*, it follows that the right cannot afterwards exiſt in another, unleſs by a derivation of it from him.—In the ſame manner alſo, if, where *neither* of the parties is poſſeſſed of the horſe, one prove that it was produced in his poſſeſſion, and the other prove his right of property, a decree muſt paſs in favour of him who proves the generation of the horſe.—It is to be obſerved

Digitized by Google

obſerved that if the *Kázee* paſs a decree in favour of the perſon who proves the production of the horſe from one in his poſſeſſion, and another perſon then prove, by evidence, the generation of it to have been from *his* property, the *Kâzee* muſt, in that caſe, paſs a decree in favour of that *third* perſon, unleſs the poſſeſſor *again* produce evidence in proof of the generation, in oppoſition to that perſon.

or to any other property founded upon a *cauſe* of right equivalent to generation.

The ſame rule holds with reſpect to materials for making cloth, where they have undergone only one operation, (ſuch as *ſpinning*, for inſtance.)—Thus, if a plaintiff and a poſſeſſor, reſpectively, aſſert that "the yarn in diſpute is his property, and he has ſpun it himſelf," and each bring evidence in ſupport of his claim, in that caſe the *Kázee* muſt paſs a decree in favour of the *poſſeſſor*, in the ſame manner as in a caſe of claim founded upon generation: and the ſame of every cauſe relating to property which is *ſimple* and not *complicated*, ſuch, for inſtance, as the extracting of milk from an animal, the making of *cheeſe*, or of *felts*, the ſheering of wool, and the like.—If, on the other hand, the cauſe of right of property be of a *complicated* nature, ſuch as the *wearing of cloth*, the *planting of trees*, or the *ſowing of wheat*, and a diſpute ariſe between a plaintiff and poſſeſſor of any of theſe articles, the *Kázee* muſt paſs a decree in favour of the *plaintiff*, and not of the *poſſeſſor*,—and ſo alſo, if a plaintiff and poſſeſſor, reſpectively, adduce evidence in proof of his abſolute right of property, without explaining the cauſe.—If the cauſe be *doubtful*, (that is, if it be unknown whether *complicated* or *ſimple*,) recourſe muſt be had to ſkilful perſons; and if it appear doubtful to them alſo, the *Kázee* muſt in that caſe decree in favour of that plaintiff who is not the poſſeſſor; becauſe the *original* principle is to paſs the decree in conformity with the evidence adduced by the plaintiff; and although an exception be eſtabliſhed in caſes of claim founded upon *generation*, (becauſe of a tradition of the prophet, who, upon a certain occaſion, decided, in ſuch a caſe, in favour of the *poſſeſſor*,) ſtill, in a caſe where the cauſe is *doubtful*, and where of courſe it cannot be aſcertained whether the article is comprehended within the exception, recourſe muſt be had to the original principle of the law.

The poſſeſſor of an article, proving his having purchaſed it from the claimant, ſets aſide his plea.

IF a plaintiff produce evidence in ſupport of his abſolute right of property in an article, and the poſſeſſor bring evidence to prove his having *purchaſed* the article from the plaintiff, the evidence of the *poſſeſſor* muſt be preferred; becauſe, although the plaintiff plead that his right of property was of prior date, yet the poſſeſſor appears to have afterwards purchaſed the article from him, (which is in no reſpect repugnant thereto,) and hence the caſe is the ſame as if the poſſeſſor were firſt to acknowledge that the article had formerly belonged to the plaintiff, and then to aſſert that he had purchaſed it from him.

If each party prove a purchaſe from the other (without ſpecifying a *date*) no decree can take place:

IF a plaintiff bring evidence to prove his purchaſe of the article in diſpute from the poſſeſſor, and the poſſeſſor, on the other hand, bring evidence in proof of his having purchaſed it from the *plaintiff*, and neither party ſpecify the date of his purchaſe, in this caſe the evidence of both falls to the ground, and the thing in diſpute is left in the hands of the poſſeſſor.—The compiler of the *Hedáya* obſerves that this is according to *Haneefa* and *Aboo Yooſaf*: but that *Mohammed* has ſaid that the *Kâzee* muſt admit the evidence of both, and that then the thing goes to the *plaintiff*; becauſe a conformity to the evidence of both is practicable, ſince it is poſſible that the poſſeſſor may have purchaſed the thing from the *plaintiff*, and having then received poſſeſſion of it, may have afterwards ſold it to him again.—This conſtruction ought therefore to be adopted; more eſpecially as ſeizin implies that the poſſeſſor muſt have made the firſt purchaſe; nor can the contrary, indeed, be ſuppoſed, becauſe (according to *Mohammed*) a thing cannot be ſold previous to the ſeller's poſſeſſion of it, although it be *land*.—The reaſoning of *Haneefa* and *Aboo Yooſaf* is that each of the parties, in pleading a purchaſe from the other, virtually makes an acknowledgment of the *right of property* in the other; and as, where each party makes an acknowledgment in favour of the other, the evidence of both muſt be ſet aſide, according to all our doctors, ſo alſo in the caſe in queſtion.—In reply to the aſſertion of *Mohammed*, it is to be obſerved that a conformity to the evidence of both is *impracticable*, in as much as the *cauſe*, namely, the *purchaſe*, is an object only as far as it is neceſſary to prove the exiſtence of the *effect*, namely, *right of property*.—Now, in the caſe in queſtion, it is impracticable to paſs a decree in favour of the *poſſeſſor*'s right of property, but by previouſly admitting the *plaintiff*'s right; and hence if the *Kázee* were to paſs a decree in favour of the poſſeſſor, it is a decree upon the *cauſe*, namely, the *purchaſe*, which would be vain and uſeleſs.

and ſo alſo, if each prove *payment of the price.*

—If, in the caſe now under conſideration, the witneſſes of each party ſhould give evidence of the payment of the price, (one thouſand *dirms*, for inſtance,) in that caſe (according to *Haneefa* and *Aboo Yooſaf*) a *Mokáſa*, or *mutual liquidation*, takes place with reſpect to both prices, provided the prices be on an equality either with regard to *prompt payment*, or to a payment at a *limited period*, becauſe in this caſe the ſeizin of each party induces reſponſibility.—If no evidence be given of the payment of the price, in this caſe alſo, according to *Mohammed*, a mutual liquidation takes place, becauſe the price is due from each party to the other reſpectively, provided the witneſſes of each ſeparately teſtify to the ſale, and alſo to the ſeizin of the article ſold.—And here, in the opinion of all our doctors, the evidence of both parties falls to the ground; ſince, even according to *Mohammed*, a conformity to the evidence of both is impracticable in this inſtance; becauſe both the ſales are valid, as being both made after ſeizin: moreover, no date is ſpecified, nor does any argument of a date exiſt by which a preference might be given to the one claim rather than to the other; they are therefore of equal force, and no ſuperiority is aſſigned to the one over the other; and the evidence of both parties conſequently is accounted of no force.—It is otherwiſe in the preceding caſe, becauſe, as no mention is there made of the ſeizin of either party, a conformity to the evidence of both is practicable, as has been already explained.

IF the thing in diſpute be *land*, and the witneſſes of both parties ſpecify the dates of purchaſe, without making any mention of the ſeizin of either party, in that caſe, where the date of the plaintiff's purchaſe precedes that of the *poſſeſſor*, the *Kâzee* (according to *Haneefa* and *Aboo Yooſaf*) muſt paſs a decree in favour of the *poſſeſſor*; and the diſpute is ſettled as if the plaintiff had firſt purchaſed the land, and then ſold it to the poſſeſſor previous to his own ſeizin of it, which in their opinion is lawful.—*Mohammed*, on the other hand, contends that the *Kâzee* ought to paſs a decree in favour of the plaintiff; becauſe, as (according to him) the ſale of land previous to the ſeizin of it is not lawful, the land ought neceſſarily to remain with the plaintiff.—If, on the other hand, the witneſſes of both parties give evidence alſo to the *ſeizin*, in that caſe the *Kâzee* muſt paſs a decree in favour of the *poſſeſſor*, according to all our doctors; becauſe both ſales are in ſuch an inſtance univerſally admitted to be valid. This, however, proceeds upon a ſuppoſition of the date of the *plaintiff*'s purchaſe being prior to that of the *poſſeſſor*'s: for if the date proved by the *poſſeſſor* be prior to that proved by the *plaintiff*, the *Kâzee* muſt paſs a decree in favour of the *plaintiff*, whether the witneſſes may or may not have ſpecified the ſeizin; and the matter is adjuſted as if the poſſeſſor had firſt purchaſed the thing from the plaintiff, and having received ſeizin of it, had afterwards ſold it to the plaintiff, without having as yet delivered it to him; or as if, having delivered it, it had reverted to him again from ſome other cauſe.

In diſputes concerning *land*, a decree muſt be paſſed in favour of the *laſt purchaſer*.

IF one of two plaintiffs produce *two*, and the other plaintiff produce *four* witneſſes, ſtill they are on an equal footing; becauſe, as the teſtimony of each two of the four witneſſes is a complete cauſe, or ground of deciſion, it follows that the evidence of four witneſſes amounts merely to *two cauſes*; and a multiplicity of cauſes is no argument of ſuperiority,

The production of any number of witneſſes above the lawful number makes no difference with reſpect to the decree.

Digitized by Google

ſuperiority, ſince it is in the *ſtrength* of a cauſe, and not in the *number*, that a ſuperiority lies.

Caſe of a claim made by two perſons to a *houſe*; where one claims the *half* and the other the *whole*.

If a houſe in poſſeſſion of any perſon be claimed by two other perſons, one of them alleging his right to the *whole*, and the other to the *half*, and each bring evidence in proof of his claim, in this caſe the *Kázee* muſt adjudge three fourths to the claimant of the *whole*, and one fourth to the claimant of the *half*, according to *Haneefa*, becauſe (agreeable to his tenets) regard muſt be had to the *nature of the diſpute*; and as, in the preſent inſtance, no diſpute ſubſiſts with reſpect to *one half*, that half goes excluſively to the claimant of the *whole*; but as there is a diſpute between the parties reſpecting the other *half*, and as they are both upon an equal footing with regard to the *ground* of their claim, that half therefore goes to them both in equal proportions.—The two diſciples allege that the houſe muſt be divided between the claimants in three equal lots, two going to the plaintiff for the *whole*, and one to the plaintiff for the *half*; becauſe, according to them, regard muſt be had to *arithmetical proportion*; in other words, the plaintiff for the *whole*, in conſideration of his claim, which is to the *two* halves, is entitled to *two* lots, and the plaintiff for the *half*, in conſideration of his claim, which is to *one* half, is entitled to *one* lot: the houſe, therefore, is divided between them in three lots.—If, on the other hand, the houſe in diſpute be in the poſſeſſion of *the parties*, the whole of the houſe in that caſe goes to the claimant of the whole; for he receives the half poſſeſſed by the claimant of the half in conſequence of a decree of the *Kázee*, (which decree muſt neceſſarily be granted him, ſince in being a claimant for the *whole*, he is a claimant for that half, without having poſſeſſion of it, and judgment muſt therefore be given according to his evidence;)—and he *keeps* the other half, of which he was himſelf poſſeſſed, as it is a neceſſary inference that the claim of the other plaintiff related only to that half of which he was in poſſeſſion, ſince if he were to prefer a claim to the *other* half, it muſt follow that the half of which he is in poſſeſſion is held by an unjuſt tenure:—and as no claim ſubſiſts with reſpect to the half in the hands of the claimant of the whole, it conſequently remains with him.—In ſhort, the *whole houſe* remains with him.

In claims founded upon generation regard muſt be paid to the *date* ſtated by the claimant.

If two perſons lay claim to an animal, and each adduce evidence to prove its production, at the ſame time ſpecifying the date, in this caſe the animal muſt be adjudged to the claimant whoſe witneſſes ſpecified a date apparently according with the age of the animal; becauſe, as probability is an argument in his favour, he is therefore entitled to a preference.—If, however, the age of the animal be *doubtful*, and an agreement with the date on one ſide or the other not apparent, it muſt then be adjudged in an equal degree to both, and the ſpecification of dates ſet aſide: that is, the caſe muſt be conſidered in the ſame light as if no dates had been mentioned.—If, on the other hand, *both* the dates be repugnant to the apparent age of the animal, the evidence of each party is nugatory, (and ſuch alſo is reported from *Hâkim*,) becauſe the falſity of the evidence on both parts is in ſuch a caſe manifeſt:—the animal is therefore left with the perſon who may be in poſſeſſion of it.

One party pleading a *truſt*, and the other aſſerting an *uſurpation*, each is upon an equal footing.

If two perſons ſeverally prefer a plea againſt another who is in poſſeſſion of a ſlave; the one pleading that "the poſſeſſor has *uſurped* "the ſaid ſlave from him," and the other, that "he has committed "the ſaid ſlave to him in *truſt*;" in this caſe the *Kâzee* muſt decree one half of the ſlave to each, as their claims are equally ſtrong.

SECTION.

Of Disputes *concerning* Possession.

The poſſeſſion of an animal is aſcertained by any act which implies an *uſe* of the animal.

If two men diſpute the poſſeſſion of an animal, one of them being mounted upon it, and the other holding the bridle, in this caſe the claim of the *rider* is the ſtrongeſt, ſince his act of *riding* upon it is an act in virtue of right of property.—In the ſame manner, alſo, if one of them be riding on the *ſaddle*, and the other on the *croup*, the claim of the perſon ſeated upon the *ſaddle* is preferable. It is otherwiſe, however, if they be mounted upon an animal without a ſaddle; for in this caſe the property of the animal is divided between them, as both are, with reſpect to the act of *riding*, upon an equal footing in ſuch an inſtance.

If two men contend concerning a camel, the one having a burden, his own property, upon it, and the other having in his hand the *Mohar* or rope that guides it, the right of the perſon having the *burden* upon it is preferable, as the camel is employed *in his ſervice*.

The right of one *uſing* a thing is preferable to that of one *laying hold* of it.

If two men diſpute reſpecting an under garment, the one wearing it, and the other holding the *ſleeve* of it, the claim of the *wearer* is preferable, as his act is evident.

If two perſons ſhould diſpute concerning a carpet, the one being ſeated upon it, and the other having hold of it with his hand, the *Kázee* muſt not paſs a decree in favour of either.

If two perſons diſpute concerning a piece of cloth, the one encloſing great part of it in his hand, and the other having hold of the *border* of it, in this caſe the cloth is equally parted between them, becauſe the greater quantity held by the one than the other does not give a ſuperiority of claim, as it goes only to furniſh one *argument* or *proof*.

Right of poſſeſſion over a *foundling* is eſtabliſhed by his own acknowledgment.

If a boy[*] be in the poſſeſſion of any perſon, and, being capable of explaining his own condition, declare that "he is *free*," his aſſertion muſt be credited, in as much as he is his own maſter.—If, on the other hand, he declare himſelf to be the *ſlave* of ſome other perſon than the poſſeſſor, he is adjudged to be the property of the poſſeſſor, becauſe, in declaring himſelf a *ſlave*, he acknowledges that he is not his own maſter.—If, alſo, the boy be not capable of explaining his own condition, he is adjudged to be the property of the poſſeſſor, becauſe not being his own maſter he is conſidered in the ſame light as *clothes* or any ſimilar article:—and if, after attaining maturity, he claim his freedom, his plea will not be admitted, becauſe his ſlavery during his childhood became apparent; and no matter that becomes apparent can afterwards be ſet aſide excepting upon proof[†].

The court of a *Serâi* is adjudged *between* the diſputants.

If there be ten apartments of a *Serai* in the poſſeſſion of one man, and one apartment in the poſſeſſion of another, and they enter into a contention reſpecting the court of the *Serâi*, in this caſe the claim of both muſt be adjudged to be equal, ſince both have an equal right to the uſe of it, and to paſs through it.

---

[*] Undoubtedly meaning a *foundling*, or *ſtrayed* child.

[†] The tranſlator has omitted a caſe of conſiderable length, which immediately follows, relative to the claim of ſundry perſons to a wall, founded upon different circumſtances which argue right of property. Theſe circumſtances the tranſlator has not been able to procure a ſatisfactory explanation of; and they are probably ſuch as relate to antiquated cuſtoms in *Arabia*.

Digitized by Google

A decree cannot be iſſued, reſpecting a claim to *land*, without the adduction of evidence.

If two men claim a piece of ground, each, reſpectively, aſſerting it to be "in his poſſeſſion," the *Kâzee* in this caſe muſt not paſs a decree in favour of the poſſeſſion of either, until evidence be produced; ſince poſſeſſion of land is not of a nature to be *actually ſeen* by the *Kâzee*, becauſe of the impracticability of producing it in court; and alſo, becauſe it is neceſſary to prove by evidence whatever is concealed from the knowledge of the *Kâzee*.—If, therefore, either of the parties produce evidence in ſupport of his claim, the land muſt be adjudged to be in his poſſeſſion; becauſe of the eſtabliſhment of proof, and alſo becauſe *poſſeſſion* is a right which is the object of deſire, in the ſame manner as other rights.—If *both* parties produce evidence in ſupport of their claims, the ground muſt in that caſe be adjudged to be jointly in poſſeſſion of both.—If, however, one of the claimants ſhould have made *bricks* upon the ground, or ſhould have *built* upon it, or *dug a well* or a *ditch* in it, in all theſe caſes the poſſeſſion muſt be adjudged to him on account of thoſe acts.

CHAP. V.

Of *Claim* of *Parentage*.

A claim made by the ſeller of a female ſlave to a child born of her within leſs than ſix months after the ſale, is eſtabliſhed:

If a perſon ſell a female ſlave, and ſhe afterwards bring forth a child, and the ſeller claim it,—in that caſe, provided the birth take place in leſs than ſix months from the ſale, the child is adjudged to the ſeller, and the mother is his *Am-Walid*.—This is according to a favourable conſtruction of the law. In the opinion of *Ziffer* and *Shafeï* the claim is null; and this is agreeable to analogy; becauſe the ſeller, in making the ſale, has virtually acknowledged the child to be a ſlave, which is inconſiſtent with his plea of its being *his child.*—The reaſon for a more favourable conſtruction in this particular is, that as the birth happened in leſs than ſix months from the ſale, it is evident that the conception muſt have exiſted whilſt the ſlave was in the poſſeſſion of the ſeller; and this argues the conception to have proceeded from the ſeller, ſince there is no reaſon to ſuppoſe that the woman was guilty of whoredom. As pregnancy, moreover, is a circumſtance which may remain unknown for a time, the ſeller is on this account vindicated from the charge of prevarication or inconſiſtency, and his claim is conſequently valid.—Now as his claim of parentage is valid, it is therefore referred to the period of conception; and hence it appears that the man has ſold his *Am-Walid*; and as the ſale of an *Am-Walid* is unlawful, it muſt therefore be annulled, and the price muſt be returned by the purchaſer, as having been unjuſtly obtained.—If, on the other hand, the purchaſer ſhould, either at the ſame time with, or poſterior to, the claim of the ſeller, claim the parentage of the child, in that caſe, alſo, the claim of the ſeller is preferred, becauſe of its having exiſted prior to that of the purchaſer, as being referred to the period of conception.—Suppoſing, however, the child to be born *two years* after the ſale, the ſeller's claim of parentage is not in that caſe valid; becauſe the conception, in this inſtance, could not poſſibly have taken place during his poſſeſſion of the ſlave, and this is the only idea under which a deciſion could paſs in his favour:—his claim, therefore, cannot be admitted unleſs it be confirmed by the purchaſer; in which caſe the parentage of the child is eſtabliſhed in the ſeller, as on a ſuppoſition of *marriage*:—for this reaſon, however, the child is not *free*, nor is the ſale annulled, ſince it is evident that the conception did not take place whilſt the ſlave was in the ſeller's poſſeſſion:—the child's freedom, therefore, is uneſtabliſhed, as well as the eventual freedom of the mother [*].—Suppoſing, alſo, the child to be

and if the *purchaſer* make the ſame claim, ſtill the claim of the *ſeller* is preferred.

If the birth happen within from *ſix months* to *two years* after the ſale, his claim is not admitted without the verification of the *purchaſer*.

---

[*] Namely, her becoming an *Am-Walid*, which would have given her an *eventual claim* to freedom. (See Vol. I. p. 479.)

be born at any period *more* than ſix months and *leſs* than two years from the date of the ſale, the claim of parentage by the ſeller cannot be admitted, unleſs it be verified by the purchaſer; ſince, in this inſtance alſo, it is not abſolutely certain that the conception took place during the ſeller's right of property, wherefore there is no proof, and hence the neceſſity of the verification of the purchaſer.—If, therefore, the purchaſer verify the claim of the ſeller, the parentage is eſtabliſhed in him, and the ſale is annulled, and the child is free, and the mother becomes an *Am-Walid*, in the ſame manner as in the firſt inſtance; becauſe the ſeller and the purchaſer are both agreed in the circumſtance of conception having taken place during the right of property of the ſeller.—If the child, having been born in *leſs* than ſix months from the ſale, ſhould die, and the ſeller ſhould afterwards claim his parentage, the mother does not in that caſe become his *Am-Walid*; becauſe ſhe is a dependant on the *child*, with regard to her eventual claim to freedom; and the child not being extant to admit of its iſſue from the ſeller being proved, ſhe cannot of courſe become his *Am-Walid*.—If, on the other hand, the *mother* were to die, where the child had been born in leſs than ſix months from the ſale, and the ſeller claim his parentage, in this caſe the parentage of the child is eſtabliſhed in the ſeller, and he is entitled to reſume the child; becauſe the child is the *principal* with reſpect to the eſtabliſhment of the parentage, and cannot therefore be affected by the extinction of a dependancy in the death of the mother.—In this caſe the ſeller, according to *Haneefa*, muſt return the whole of the price, becauſe it becomes apparent that he ſold his *Am-Walid*, and *Haneefa* holds that the property involved in an *Am-Walid* is not of an appreciable nature, in ſales and uſurpations, and that therefore the purchaſer is not reſponſible for it in the preſent inſtance.—In the opinion of the two diſciples, however, he ought only to return a *proportion* of the price adequate to the value of the child, becauſe (according to them) the property involved in an *Am-Walid* is of an appreciable nature, and conſequently induces reſponſibility in a purchaſer.

The mother becomes his *Am Walid* if the child be living at the time of the claim.

It

If made by the ſeller, after the mother has been emancipated by the purchaſer, it is valid: but if the *child* ſhould have been emancipated by him it is null.

IT is related, in the *Jama Sagheer*, that if a female ſlave, being pregnant, ſhould be ſold by her maſter, and having afterwards brought forth a child, the ſeller ſhould claim the child after ſhe had been emancipated by the purchaſer, in this caſe the child is conſidered as the offspring of the ſeller, and he muſt return to the purchaſer a part of the price proportionate to its value. This alſo accords with the opinion of the two diſciples. *Haneefa* alleges that the ſeller muſt return the whole of the price, in the ſame manner as in caſe of the mother's *death*; and this is approved.—If, however, the purchaſer ſhould have emancipated the *child* only, in this caſe the claim of the ſeller is null.—The reaſon for the diſtinction between theſe two caſes is as follows.—In the *former* caſe, the child being the *principal* with regard to the claim, and the mother only a *dependancy*, (as has been already explained,) it follows that the bar to the claim of parentage and claim of offspring (namely, *emancipation*) exiſts in the *dependant*, that is, in the *mother*,—and conſequently cannot operate upon the *child*, who is a *principal*:—the claim to the child is therefore approved, and it is accordingly free; and the parentage is eſtabliſhed in the ſeller. The freedom of the child, moreover, or the eſtabliſhment of parentage, do not neceſſarily infer that the mother alſo is emancipated;—(whence it is that the child of a *Magroor* is free, whilſt the mother remains a ſlave;—and alſo, that if a perſon marry the female ſlave of another, and beget a child upon her, the parentage is eſtabliſhed in him, whilſt the mother continues the ſlave of her maſter.)—In the *ſecond* caſe, on the contrary, the bar exiſts in the *child*, who is the *principal*, and hence the claim cannot be made good either with reſpect to the *principal* or the *dependancy*.—The freedom of the child is a bar to the validity of the claim, becauſe, as *emancipation* is incapable of annulment, in the ſame manner as a claim of parentage or of offspring are incapable of it, they are therefore both of equal force. Now, in the caſe in queſtion, an actual manumiſſion has been eſtabliſhed on the part of the purchaſer, whilſt on the part of the ſeller, on the other hand, is eſtabliſhed a right of claim in regard to the *child*, and a right of emancipation in regard to the *mother*; but a mere *right* to a thing cannot be oppoſed to the actual thing itſelf.—It is alſo to be obſerved that the purchaſer's creating the child a *Modabbir* is, in this reſpect, equivalent to the complete emancipation of him, as that alſo is incapable of annulment, and is, moreover, followed by certain of the effects of emancipation,—ſuch, for inſtance, as preventing *ſale*.

A claim made by the original ſeller, after a *ſecond* ſale, is valid; and that ſale is null.

If a perſon ſell a ſlave, that has been born of a female ſlave, who was his property at the time of the birth [*], and the purchaſer afterwards ſell him to another perſon, and the firſt ſeller then claim him, in that caſe the ſlave in queſtion is his child, and the ſale is null; becauſe ſale is capable of annulment, whereas the right of this perſon to claim the parentage of the ſlave is incapable of it; the ſale is accordingly annulled.—In the ſame manner, if the buyer, after the purchaſe of the mother and ſon, ſhould make a *Mokâtib* of the former, or pledge him, or let him out to hire,—or, if he ſhould make a *Mokâtiba* of the mother, or pledge her, or give her in marriage to ſome perſon, and the ſeller afterwards claim the child,—in any of theſe caſes his claim muſt be admitted; and all the ſeveral contracts mentioned are annulled, as they are all capable of annulment.—It is otherwiſe where the purchaſer emancipates or makes a *Modabbir* of the child,—as has been already explained:—and it is alſo otherwiſe where the *purchaſer* firſt claims him as his child, and afterwards the *ſeller*,—becauſe the parentage, after having been eſtabliſhed in the purchaſer, cannot again be eſtabliſhed in the *ſeller*, as it is a right which is incapable of annulment, and hence the caſe is the ſame as if the purchaſer had *emancipated* him.

A claim eſtabliſhed with reſpect

If a female ſlave bring forth twins, and the proprietor claim the parentage of one of them, in this caſe the eſtabliſhment of parentage in him, with reſpect to *one* of them, neceſſarily involves the ſame with reſpect to the *other*; becauſe they muſt both have been conceived from one ſeed; for this reaſon, that by *twins* is underſtood two children born of the ſame mother, and between the birth of whom a period of leſs than ſix months has intervened,—and it is therefore impoſſible that the conception of the other child ſhould have been *ſupervenient* and *ſeparate*, as pregnancy * cannot be ſhort of *ſix months*.—It is related, in the *Jama Sagheer*, that if a perſon be poſſeſſed of two ſlaves, twins, who had been born his property, and he ſhould ſell one of them, and the purchaſer emancipate him, and the ſeller afterwards avow, as his iſſue, the one who remains in his hands, in this caſe both the twins are his children, and the emancipation of the purchaſer is null †; becauſe, upon the parentage being eſtabliſhed of the one in his poſſeſſion, by which he becomes free, the parentage and conſequent freedom of the *other* are neceſſarily involved, as they are *twins*. Hence, as it appears that the purchaſer bought a perſon who was originally free, it follows that his purchaſe, and conſequently his emancipation of him, is null.—It is otherwiſe where there is only *one* ſlave, for in this caſe the buyer's purchaſe and conſequent emancipation are not liable to be annulled upon the ſeller eſtabliſhing his claim; whereas, in the caſe now under conſideration, the emancipation of the purchaſer is rendered null *dependantly*; in other words, freedom is firſt eſtabliſhed in the ſlave who remained in the claimant's hands, and is then, *dependantly*, eſtabliſhed in him who was ſold and afterwards emancipated. There is therefore a material difference between the caſes ‡.

---

[*] This caſe ſuppoſes the child and the mother to be ſold together, as appears by the context a little further on.

to *one* twin eſtabliſhes it with reſpect to the *other* alſo.

---

* Meaning the pregnancy requiſite to produce a *perfect* child.

† One effect of which is to deſtroy his right of *Willa*, which he would otherwiſe have enjoyed.

‡ This caſe has been ſomewhat abridged in the tranſlation, and in particular the latter part of it is entirely omitted, as being a mere repetition.

Digitized by Google

A claim of offspring cannot be eſtabliſhed, after an acknowledgment in favour of another perſon.

If a perſon be poſſeſſed of a boy, and declare the boy to be the ſon of a certain abſent ſlave, and afterwards declare him to be his *own* ſon, in this caſe the parentage of the poſſeſſor can never be eſtabliſhed, although the abſent ſlave were to *deny* the boy to be his ſon.—This is according to *Haneefa.* The two diſciples have ſaid that, in caſe of the denial of the ſlave, the parentage of the poſſeſſor is eſtabliſhed.—A ſimilar diſagreement ſubſiſts where the poſſeſſor declares the boy in his poſſeſſion to be the ſon of a particular perſon, and born of his wife, and afterwards himſelf claims the parentage of him.—The reaſoning of the two diſciples is that the acknowledgment, by the maſter, of the boy being the ſon of his ſlave, is repelled by the denial of the ſlave, whence the caſe becomes the ſame as if no ſuch acknowledgment had ever been made.—Now, although parentage cannot be annulled after the eſtabliſhment of it, yet an *acknowledgment* of parentage is ſet aſide by the denial of the perſon who is the object of it, and the acknowledgment is aſcribed to levity or compulſion;—(as if a perſon, by way of levity, or under the influence of compulſion, ſhould make an acknowledgment that his ſlave was his *ſon*, in which caſe his acknowledgment is not valid:)—the caſe in queſtion, therefore, becomes the ſame as if a purchaſer of a ſlave ſhould acknowledge that the "ſeller "had emancipated him," and the ſeller deny the ſame, and the purchaſer then ſay that "he had *himſelf* emancipated him;" for in this caſe the laſt aſſertion of the *purchaſer* is credited, and the *willa*-right with reſpect to the ſlave thus emancipated reſts with him; and his acknowledgment with regard to the ſeller is conſidered as never having exiſted; ſo alſo in the caſe in queſtion.—It would be otherwiſe if the *boy* ſhould verify the firſt aſſertion of the poſſeſſor, (that "he is the ſon of a certain abſent ſlave,") and the poſſeſſor himſelf ſhould then claim the iſſue; becauſe the claim would in ſuch a caſe be invalid, as having been preferred after the proof of parentage in another. It would alſo be otherwiſe if the ſlave ſhould remain ſilent, without either confirming or denying the claim; for, in this caſe alſo, the ſubſequent claim of the poſſeſſor would be invalid, becauſe the right of the perſon acknowledged relates to the *boy*, and there is a poſſibility that he may *verify* the aſſertion of the poſſeſſor.—The boy, therefore, in this inſtance, ſtands in the ſame predicament with the ſon of a woman who has been required to make aſſeveration *, and whoſe parentage cannot be proved by any other than the *imprecator*, (namely, the huſband of the woman,) who has the power of afterward contradicting himſelf, and declaring that the ſaid ſon is his *iſſue*.—*Haneefa*, on the other hand, argues that parentage is a matter which, after proof, cannot be ſet aſide; nor can the acknowledgement of ſuch a matter be undone by the rejection of the perſon who is the object of it: it therefore continues in force notwithſtanding the rejection; and hence the claim of the maſter, ſubſequent to ſuch acknowledgment, is invalid, although the ſlave ſhould *contradict* the acknowledgment; in the ſame manner as if a perſon ſhould bear teſtimony to the parentage of an infant, and, his teſtimony being ſet aſide from ſuſpicion, he ſhould then claim the ſaid infant as his ſon; in which caſe his claim would not be valid; and ſo alſo in the caſe in queſtion. The ground on which this proceeds is that the right of the perſon in queſtion (namely, the *ſlave*) relates to the *boy*, inſomuch that, if the ſlave ſhould verify the aſſertion of the maſter ſubſequent to a contradiction, the parentage of the boy is eſtabliſhed in the ſlave: and, in the ſame manner, the right of the boy is connected with the acknowledgment of the maſter; and hence the acknowledgment cannot be ſet aſide by the contradiction of the ſlave †.—With reſpect to the caſe of a purchaſer acquiring the right of *Willa*, adduced by the two diſciples as analogous to this, it may be replied that a diſagreement ſubſiſts concerning this caſe alſo; as *Haneefa* does not admit the doctrine there advanced:—or, if it be admitted, ſtill there ſubſiſts this difference between it and the caſe in queſtion, that *Willa* is capable of annullment,—in other words, the right of *Willa* in one perſon is ſometimes ſet aſide in favour of another, when any ſupervenient circumſtance occurs to ſtrengthen the claims of that other. Thus, if *Zeyd* ſhould contract his female ſlave in marriage with the ſlave of *Khálid*, and after their having iſſue ſhould emancipate the mother, in this caſe the right of *Willa*, or patronage, over the child, belongs to *Zeyd*; but if afterwards *Khálid* ſhould emancipate his ſlave, who is the father of the child, then the right of *Willa* over the child would be annulled in *Zeyd*, and would veſt in *Khálid*, the emancipator of the father, ſince the right derived from the emancipation of the *father* is ſtronger than that derived from the emancipation of the *mother*:—whereas, in the caſe exemplified by the two diſciples, the eſtabliſhment of the right of *Willa* in the ſeller of the ſlave reſts on the ſuppoſition of the ſeller, after having contradicted the purchaſer, again contradicting himſelf, and verifying the aſſertion of the purchaſer; and when, in this ſtate of ſuſpended *Willa*, a circumſtance intervenes which operates as a ſtronger cauſe for the eſtabliſhment of the *Willa* in the purchaſer, the ſuſpended *Willa* in the ſeller becomes null.—The circumſtance here alluded to is the aſſertion of the purchaſer that "he emancipated "the ſlave;" and this operates as a *ſtronger* cauſe, ſince it gives immediate freedom to the ſlave in conſequence of his being the property of the purchaſer, whereas the emancipation of the ſeller does not give immediate freedom, as it reſts upon the verification of the purchaſer, and hence becomes null on the ſupervention of a ſtronger cauſe; becauſe *Willa* is capable of annulment; contrary to *parentage*, as has been already explained.—From this doctrine of *Haneefa*, that the poſſeſſor's acknowledgment of the boy being the ſon of his ſlave cannot afterwards be ſet aſide by the contradiction of the perſon who is the ſubject of that acknowledgment,—and that, conſequently, any ſubſequent claim of the poſſeſſor to the parentage of the child will not be valid,—it follows that a decree may be founded upon it for eſtabliſhing the validity of a father's ſelling his ſon begotten upon his ſlave; for, in order to remove any apprehenſions from the mind of the purchaſer of his afterwards claiming his ſon, and thereby rendering the ſale null, he may make an acknowledgment of the iſſue in favour of another, by which means he will effectually preclude the poſſibility of *himſelf* afterwards preferring a valid claim to him.

---

* See Vol. I. p. 344.

† Becauſe a declaration which tends to eſtabliſh a right cannot be revoked: and, in the caſe in queſtion, the right of the boy is to have his parentage eſtabliſhed and aſcertained.

A claim of *parentage* made by a *Chriſtian* is preferable to a claim of *bondage* advanced by a *Muſſulman.*

IF a boy be in the poſſeſſion of *two* men, of whom one is a *Muſſulman* and the other a *Chriſtian*, and the *Chriſtian* aſſert that "he is his "*ſon*," and the *Muſſulman* that "he is his *ſlave*," he muſt in this caſe be decreed to be the *ſon of the Chriſtian*, and *free*; becauſe, although the religion of *Iſlâm* have a ſuperiority, yet that ſuperiority is allowed to operate only in caſes which are balanced againſt each other; but there is no balance between a claim of *offſpring* and of *bondage*: the claim of the *Chriſtian* is therefore admitted; becauſe this is attended with a great benefit to the boy, ſince it procures him *immediate freedom*, and (as may alſo be expected) *future faith*, in as much as the arguments for the unity of the Godhead are evident and plain; whereas, if a contrary decree be paſſed, (that is, if the boy ſhould be decreed to be the ſlave of the *Muſſulman*, and not the ſon of the *Chriſtian*,) in that caſe the true faith in the boy would be eſtabliſhed merely from *dependance*, whilſt he muſt be precluded from *freedom*, as not having the power himſelf to acquire it.—If, however, both the *Muſſulman* and the *Chriſtian* claim the iſſue, the claim of the *Muſſulman* muſt in that caſe be preferred, on account of the ſuperiority due to the *true faith*, and becauſe of the ſuperior advantage that would reſult to the boy.

A claim of parentage, by a married woman, is not admitted, unleſs at leaſt *one woman* teſtify to the birth;

IF a married woman ſhould claim parentage, as if ſhe ſhould ſay, "this boy in my arms is my ſon," her claim is not valid unleſs the birth be atteſted by the teſtimony of *one woman*; becauſe the claim ſo made relates to another, and is therefore not admitted unleſs ſupported *by proof*: in contradiction to the caſe of a *father*, as has claim of parentage relates purely to *himſelf*.—(It is to be obſerved that the teſtimony

Digitized by Google

mony of the *midwiſe* alone is ſufficient with reſpect to birth, ſince the object of the teſtimony is merely to aſcertain that the child in queſtion is the identical child which the ſaid woman brought forth; whilſt parentage, on the other hand, is eſtabliſhed on the ground of the mother of the child being the wife of the huſband:—it is, moreover, recorded, in the *Nakl Saheeh*, that the prophet accepted the teſtimony of a midwife, in a caſe of birth.)—If, however, the woman in queſtion be in her *edit* from a complete divorce, the teſtimony of the *midwiſe* alone does not ſuffice with reſpect to the birth;—on the contrary, that of two men, or of one man and two women, is requiſite.—(This is the doctrine according to the opinion of *Haneeſa*, as has been already mentioned in treating of divorce.)

or (if ſhe be in her *edit*) one *man* and two *women*:

If the woman be neither married, nor in her *edit* from divorce, in this caſe lawyers have aſſerted that the parentage of the child is eſtabliſhed by *herſelf*; her own aſſertion on this head being admitted; ſince, in this caſe, it does not operate upon, or affect, any other perſon.—But if, being married, ſhe ſhould ſay, "this is my ſon, begotten by this my huſband," and the huſband verify the ſame, there is in this caſe no occaſion for one witneſs to prove the birth, ſince the acknowledgment of the huſband renders it unneceſſary.—If the boy be in the joint poſſeſſion of the wife and her huſband, and the huſband ſhould ſay "this boy is my ſon, begotten not on this woman but on another," and the woman ſhould ſay "this is my ſon, begotten by *another huſband*," in this caſe the boy is decreed to be their ſon, becauſe of the probability of the thing founded upon their joint poſſeſſion of the boy, and their connection with each other as huſband and wife. Beſides, the aſſertion of each has a tendency to deſtroy the right of the other, and therefore that of neither ought to be adopted.—This caſe reſembles that where each of two men, having jointly the poſſeſſion of a piece of cloth, aſſerts that it is the joint property of himſelf and ſome other perſon, in which caſe the cloth is adjudged to be the property of the two poſſeſſors.—There is, however, this

but if her huſband verify her claim, there is no occaſion for ſuch evidence.

this difference between theſe two caſes,—that, in the caſe of the *cloth*, the other perſons, in favour of whom the parties have reſpectively made an acknowledgment, are admitted to a participation in the ſhares of their reſpective acknowledgers, becauſe of the ſubject of contention (namely, the *cloth*) being capable of diviſion;—whereas, in the caſe in queſtion, the perſons referred to are not admitted to a participation in the right of the acknowledgers, ſince *parentage* (which is the ſubject of it) does not admit of participation.

Caſe of a perſon begetting a child upon a female ſlave, under an erroneous poſſeſſion.

IF a perſon purchaſe a female ſlave, and beget a child upon her, and claim it, after its birth, as his iſſue, and it afterwards appear that the ſlave had *not* been the property of the *ſeller*, in this caſe the purchaſer muſt give, to the rightful maſter of the ſlave, the value which the child may bear at the time of contention,—and the child is *free*; *firſt*, becauſe he is the offspring of a *Magroor*; for a *Magroor* is defined to be a perſon who begets a child upon a woman, on the belief of her being his property,—(or whom he has in that belief married,)—and who afterwards proves to be the property of another; and this definition of a *Magroor* is exactly applicable to the perſon in queſtion; the iſſue of a *Magroor* is therefore free for an equivalent, according to all the companions;—in the *ſecond* place, a regard muſt be had to the right of both parties.—The ſaid child is therefore completely *free*, in behalf of his *father*, and a *ſlave* in behalf of the plaintiff, namely, the proprietor of his mother.—Now, ſince the child remains in the poſſeſſion of the father without any tranſgreſſion or unwarrantable act on the part of the father, the father is therefore not reſponſible for it unleſs he become a bar to the ſeizin of it by the proprietor, (in the ſame manner as is decreed in the caſe of the child of an uſurped female ſlave;) and he is a bar only where, the plaintiff having demanded the child, he [the father] refuſes to ſurrender him; whence it is that the value of the child is eſtimated from the day of contention, as it is then that the bar begins to operate. If, therefore, the child ſhould die in the poſſeſſion of the father, without any contention having happened, the

Digitized by Google

the father is in no degree reſponſible, ſince no bar had taken place; and hence, alſo, if the child ſhould die poſſeſſed of property, the father inherits it, as the child was completely free in right of his father.—If, on the other hand, the father ſhould *kill* the ſon, he muſt in this caſe make compenſation for the value, ſince he himſelf operated as a bar to the proprietor's right.—In the ſame manner alſo, if any *other* than the father were to kill the child, and the father exact the *fine of blood*, he muſt pay the value to the proprietor; becauſe, although the child be deſtroyed, yet the compenſation remains whole and entire in the hands of the father, (ſince the *fine of blood* is a compenſation;) and, as the exiſtence of the compenſation is equivalent to the exiſtence of the thing itſelf, and the bar to the compenſation is equivalent to the bar to the thing itſelf, it follows that it is incumbent on him to give the value, in the ſame manner as it would have been incumbent on him in caſe of the exiſtence of the child.—It is to be obſerved that the purchaſer, after paying a compenſation for the value of the child, is entitled to receive the ſaid value from the ſeller, ſince the ſeller was reſponſible to him for the ſafety and preſervation of it; he is therefore entitled to exact from the ſeller the value of the child, in the ſame manner as the price of the mother.—It is different, however, with reſpect to the *Akir*, or *fine of treſpaſs*, as he is not entitled to exact that from the ſeller.—The purchaſer therefore, as having had carnal knowledge of a woman who was the property of another, although he be exempted from puniſhment for whoredom, becauſe of the doubt which exiſted, is notwithſtanding required to pay to the proprietor an *Akir*, or *fine of treſpaſs*;—but he muſt not demand a reimburſement for the *Akir* from the *ſeller*, becauſe he became liable to pay it for the commiſſion of an act of which he himſelf reaped the ſole benefit.

Digitized by Google

HEDÂYA.

BOOK XXV.

Of IKRÂR, or ACKNOWLEDGMENTS.

Definition of the term.

IKRÂR, in the language of the LAW, means the notification or avowal of the right of another upon one's ſelf.—The perſon making ſuch acknowledgment is termed *Mookir*;—the perſon in whoſe favour the acknowledgment is made is termed *Mookir-lee-hoo*; and the thing which is the ſubject of the acknowledgment is termed *Mookir-be-hee.*

Chap. I. Introductory.
Chap. II. Of Exceptions, and what is deemed equivalent to Exception.
Chap. III. Of Acknowledgments made by *Sick* Perſons.

CHAP. I.

Acknowledgment, proceeding from a competent perſon, is binding upon the acknowledger,

but not upon any *other* perſon.

The points that eſtabliſh competency are *freedom*,

WHEN a perſon poſſeſſing ſanity of mind, and arrived at the age of maturity, makes an acknowledgment of a right, ſuch acknowledgement is binding upon him, whether the ſubject of it be known or unknown; becauſe acknowledgment (as has been already explained) is an avowal of the right of another upon one's ſelf, and by acknowledgment the right of another becomes binding;—and this argues the eſtabliſhment of ſuch right; becauſe, *property* being deſired by all men, it is not likely that any perſon would *falſely* eſtabliſh the right of another to a part of his own. Beſides, the prophet ordered *Mâaz* to be ſtoned in conſequence of his acknowledgment of whoredom.—It is proper, in this place, to obſerve that *acknowledgment* is a *defective* proof,—in other words, it operates only upon the perſon of the *acknowledger*, and not upon that of another, ſince over *that* he has no power.—*Freedom* is eſtabliſhed as a neceſſary qualification in an acknowledger, in order that his acknowledgment may be valid, *abſolutely*,—(that is to ſay, with reſpect to *property* and the like:) for although a *privileged* ſlave be, virtually, the ſame as a *freeman* with reſpect to *acknowledgment*, yet the acknowledgment of an *inhibited* ſlave is not valid with reſpect to *property*, but merely with reſpect to *puniſhment*, or *retaliation*.—The reaſon of this is that the acknowledgment of an *inhibited* ſlave induces the obligation of a debt upon himſelf; and his *ſelf* being the property of his *maſter*, it is conſequently the ſame as if he had made an acknowledgment in regard to *another*, which is not lawful.—It is otherwiſe with reſpect to a *privileged* ſlave; for his acknowledgment is valid, as his maſter, in privileging him, does virtually aſſent to his contracting debts.—It is otherwiſe, alſo, with reſpect to the acknowledgment of *inhibited* ſlaves, in caſes of puniſhment and retaliation; for if an inhibited ſlave ſhould ſay "I have committed whoredom with a certain woman,"—or "I have killed a certain perſon,"—his acknowledgment would in theſe caſes be valid; ſince a ſlave, in matters relative to puniſhment and retaliation, is allowed to aſſume his original condition of *freedom*; (whence it is that the acknowledgment of his maſter with regard to him in theſe caſes is invalid.)—Sanity of mind, and maturity of years, are alſo neceſſary conditions in acknowledgment, becauſe the acknowledgment of an *infant* or an *idiot* is invalid, as neither has any power to aſſume an obligation upon himſelf. The acknowledgment of a *privileged* infant is, however, valid, as he is virtually a *major*.

ſanity of mind, and *maturity.*

Ignorance, with reſpect to the ſubject, is not deſtructive of the validity of acknowledgment, ſince it ſometimes happens that an *unknown* right is due; as where, for inſtance, a perſon deſtroys ſomething belonging to another, of which the value was not known to the owner,—or gives a perſon a wound, of which the ſpecific fine is not known at the inſtant.—or, where a perſon has accounts to ſettle with another, and of which he knows not the exact balance in favour of the other. Acknowledgment, moreover, is an intimation of the right of another; and the acknowledgment of an *unknown* right is therefore valid.—(It is otherwiſe where the *perſon in whoſe favour the acknowledgment is made* is unknown; for this is invalid, as a right or claim cannot reſt in an unknown perſon.)—As the acknowledgment, therefore, of an unknown right is valid, the acknowledger muſt be required to define the unknown thing, ſince it is with him that the ignorance originates;—in the ſame manner as where a perſon emancipates one of two ſlaves,—in which caſe he is required to ſpecify the one to whom the emancipation applies.—If the acknowledger ſhould refuſe to make the ſpecification, then the *Kázee* muſt *compel* him; ſince it is incumbent upon him to diſengage himſelf from the reſponſibility founded upon a valid acknowledgment, which he has incurred, and this cannot be effectual but by a ſpecification.

Acknowledgment is not invalidated by ignorance of the ſubject;

but it is ſo, by ignorance of the perſon in whoſe favour the acknowledgement is made.

Acknowledgment *generally* made muſt be ſpecified to relate to ſomething of a *valuable* nature;

If a perſon ſay "I owe a thing (or a *right*) to a certain perſon," it is incumbent on him to ſpecify ſomething *valuable*; becauſe he has acknowledged an obligation; and a thing which does not bear value induces no obligation: if, therefore, he ſpecify ſomething which bears *no* value, it is conſidered as a retractation of his acknowledgment; which in temporal concerns is not admitted.—In the ſame manner, alſo, if a perſon ſhould ſay "I have *uſurped* a thing from a certain "perſon," it is incumbent on him to explain it to be ſomething bearing value, and to the taking of which there exiſted ſome bar and prevention; ſince uſurpation is not eſtabliſhed unleſs there be a bar to the taking of it; and according to eſtabliſhed cuſtom there is *no* bar where the thing in queſtion bears no value.

and if more be claimed than the acknowledger ſpecifies, *his* aſſertion, upon oath, is credited.

If a perſon make an acknowledgment with reſpect to an unknown *thing*, or an unknown *right*, and define it to be ſomething bearing value, and the perſon in whoſe favour the acknowledgment is made ſhould claim *more* than is defined by the acknowledger,—in this caſe the aſſertion of the *acknowledger*, corroborated by an oath, muſt be credited.

An acknowledgment, expreſſed under the general term *property*, muſt be received according to the explanation of the acknowledger:

If a perſon ſay "*property* * is due by me to a certain perſon," he muſt explain the amount; and his explanation muſt be credited, whether it be great or ſmall, ſince great and ſmall are alike applicable to property.—If, however, he ſpecify leſs than one *dirm*, it is not to be admitted, ſince, in common uſage, any thing ſhort of a *dirm* is not reckoned *property*.

but, if made to a GREAT *property*, it cannot mean

If he ſhould ſay "a *great* property is due by me," then, provided he explain it to be *leſs* than two hundred *dirms*, it cannot be admitted according to the two diſciples, (and alſo according to one report from *Haneefa*;) becauſe, where he deſcribes the property in queſtion, as being *conſiderable*, his explanation to any amount ſhort of two hundred *dirms* is not to be credited; for, if it were otherwiſe, his deſcription of *great* would be idle and nugatory, ſince the ſmalleſt ſum which can properly be termed *great* is that which conſtitutes a *Niſâb* in *Zakât*[*],—namely, two hundred *dirms*; as it is the poſſeſſion of this ſum which brings a perſon within the deſcription of *wealthy*.—There is another opinion aſcribed to *Haneefa*, that the explanation, if it be *leſs* than ten *dirms*, (which is the *Niſâb* fixed for *theft*[†],) muſt not be admitted; becauſe ten *dirms* are what may properly be termed a *great* property, whence it is that, for the theft of that quantity, the hand of man (which is otherwiſe ſacred) is cut off.—What is here advanced reſpects an acknowledgment of great property in *dirms*.—But if he ſhould have ſaid "I owe great property of *deenârs*," then the amount due is fixed at twenty *Miſkâls*. In *camels* it is *twenty-five*; becauſe the ſmalleſt *Niſâb* of camels upon which a camel is due in *Zakât*, is *twenty-five*[‡].—In all property not ſubject to *Zakât*, the explanation is required to amount to a *Niſâb* with reſpect to the *value*[§]; that is to ſay, if the acknowledger explain to the *value* of a *Niſâb* his acknowledgment is to be credited; but if to *leſs*, it muſt be rejected.—If the acknowledger ſhould ſay "I owe large properties," the ſmalleſt ſpecification that can in that caſe be admitted is three *Niſâbs*, of that ſpecies of property to which the acknowledgment relates; becauſe the word *properties* is *plural*, and the ſmalleſt degree of plurality is *three*.

---

* Arab. *Mâl*; meaning property in *caſh*, or in the *precious metals*, &c. in oppoſition to *Rakht* and *Mattâ*, which are particularly applied to *goods* and *effects*.

leſs than what conſtitutes a *Niſâb* in the property to which it relates.

Caſes of acknowledgement relating to *many* DIRMS.

IF a perſon ſhould ſay "I owe many *dirms*," his explanation is not admitted to an amount ſhort of ten *dirms*, according to *Haneefa*.—The two diſciples maintain that it is not to be admitted to an amount ſhort of *two hundred*; becauſe a proprietor of a *Niſâb* (namely, two hundred *dirms*) is held to be *opulent*,—(not one who is poſſeſſed of a *ſmaller* number,) whence it is that the proprietor of a *Niſâb* is required to aid and aſſiſt others, and not he who is poſſeſſed of a *ſmaller* number.—The reaſoning of *Haneefa* is founded upon principles peculiar to the *Arabic* language.

---

[*] See Vol. I. p. 2.

[†] See Vol. II. p. 84.

[‡] Upon which a *Zakât* is paid of a *yearling camel's colt*. (See Vol. I. p. 11.)

[§] See Vol. I. p. 25, and 27.

or to DIRMS, *generally*.

If the acknowledger ſhould ſay "I owe *dirms*," he is ſuppoſed to mean *three*, as that is the leaſt number of *plurality*. But if he ſhould himſelf explain a *larger* number, it muſt be admitted, as the word *dirms* may be applied to any number.—The weight of the *dirms* muſt be eſtimated from what is cuſtomary *.

SECTION.

Acknowledgment made in favour of an *embryo* (in virtue of *bequeſt* or *inheritance*) is valid,

provided the birth take place within a probable period;

If a perſon ſay "I am bound, for a thouſand *dirms*, to the conception in the womb of a certain woman;" and afterwards add that "the ſaid ſum is due in virtue of a bequeſt of a particular perſon,"—or that "it is the right of the conception in virtue of inheritance from its parent,"—the acknowledgment ſo made is valid, in as much as it relates (in theſe inſtances) to a cauſe which is fit and adequate to the eſtabliſhment of a right to property in a conception.—If, therefore, the woman ſhould afterwards bring forth a living child within ſuch a period as evinces the conception to have exiſted in the womb at the time of the acknowledgment, the acknowledger is bound to the child for a thouſand *dirms*.—If, on the other hand, the woman ſhould bring forth a *dead* child, the acknowledgment in that caſe relates to the *teſtator* or the *inheritee*, and the amount of it muſt accordingly be divided amongſt their heirs; becauſe the acknowledgment was in reality in favour of the *teſtator*, or the *inheritee*, and was to veſt in the offspring only on condition of its being born *alive*, which did not afterwards take place.—If the woman ſhould bring forth *two* living children, then the thing acknowledged muſt be divided equally between them.

---

* A conſiderable portion of the text which immediately follows has been omitted by the tranſlator, as the caſes which it contains, relating entirely to verbal criticiſm, cannot eaſily be tranſlated, and are ſuch as belong more properly to the province of *grammarians* than of *lawyers*.

and if the embryo prove *ſtill born*, the thing acknowledged muſt be divided among the heirs; or, if *twins* be born, it muſt be divided between them:

If a perſon ſay "I am bound to the conception of a certain woman "for a thouſand *dirms*, being the price of an article I purchaſed from "the ſaid conception," or "being money borrowed from it,"—no obligation reſts upon the acknowledger, as he explained it to ariſe from a cauſe which could not have happened, ſince a conception is incapable of either *lending* or *ſelling*.

but if ſuch acknowledgement be aſcribed to an *impoſſible* cauſe, it is *null*;

If a perſon acknowledge his being bound to a conception, without ſpecifying the cauſe, ſuch acknowledgment (according to *Aboo Yooſaf*) is invalid.—*Mohammed* maintains that it is valid; for, as acknowledgment is *proof*, it is neceſſary to fulfil it as far as may be practicable; and it *is* practicable to fulfil it, in the preſent inſtance, by conſtruing the cauſe to have been ſuch as was competent to the eſtabliſhment of a right of property in the conception.—The argument of *Aboo Yooſaf* is that an acknowledgment, when abſolute, is conſtrued to be in virtue of *traffic*; (whence it is that the acknowledgement of a privileged ſlave, or of one out of the two partners by reciprocity, is underſtood to be an acknowledgment founded upon *traffic*;) the caſe, therefore, is the ſame as if the acknowledger had expreſsly ſpecified the cauſe to be *traffic*;—and as that would have been invalid, ſo alſo is it invalid where the cauſe is underſtood to be ſuch from implication.

and ſo alſo, if it be made without ſpecifying *any* cauſe.

Acknowledgment relating to a thing *exiſting*, but not yet *produced*, is valid.

If a perſon acknowledge the conception of a female ſlave, or the offspring of a goat, to be due to another, ſuch acknowledgment is binding; ſince it would have been valid if he had *bequeathed* either of theſe, and his intention is therefore conſtrued to be ſuch.

Acknowledgment of a debt, under a condition of option, is valid, and the condition becomes null.

If a perſon ſhould make acknowledgment that "he owes another "a thouſand *dirms* upon an optional condition," (in other words, if he ſhould ſay "the ſaid amount is due by me (or, *from* me,) but I "have an option of three days,")—the condition of option is in this caſe null, ſince optional conditions are inſtituted with a view to *annulment*, whereas an acknowledgment is a notification or avowal, which is binding; the acknowledgment, therefore, is in this caſe binding, and is not rendered null by the nullity of the condition.

CHAP. II.

Of Exceptions; and what is deemed equivalent to Exception *.

The exception of a *part* of the thing acknowledged is valid, if immediately joined

If a perſon make an acknowledgment of a thing in favour of another, adding an exception of *part* of the thing ſo acknowledged, ſuch exception is valid; and the acknowledger becomes bound for the remainder, whether the exception be *great* or *ſmall*; provided, however,

---

* "*What is deemed equivalent to exception*,"—that is, *reſervation* of any kind, &c.

Digitized by Google

ever, that it be immediately joined to the acknowledgment[*].—If, on the contrary, he except the *whole* of the thing acknowledged, the acknowledgment is in that caſe binding, and the exception null; becauſe this is in fact a *retraction*, not an *exception*; for *exception* ſuppoſes the remainder of a part after the deduction of the thing excepted from the whole; but after the deduction of the whole there is no remainder: it is therefore a retractation, and conſequently null.

with the acknowledgement: but if the *whole* be excepted, the exception is not attended to.

The *exception* muſt be homogeneous with the *acknowledgment*; otherwiſe it is *invalid*.

IF a perſon ſay "I am bound to a certain perſon for a hundred "*dirms*, with the exception of one *deenar*," (or "of one *Kaſeez* of "wheat[†],") then, according to the two diſciples, he is bound for a hundred *dirms*, with the exception of one *deenar*, (or of one *Kaſeez* of wheat.)—If, on the contrary, he ſhould ſay "I owe a hundred "*dirms*, with the exception of one piece of cloth;" the exception ſo made is *not* valid.—*Mohammed* maintains that the exception is invalid in both caſes.—*Shaſei*, on the other hand, holds that in both caſes it is valid.—The argument of *Mohammed* is that an exception means a deduction from the thing mentioned in the preceding part of the ſentence, which cannot be eſtabliſhed where the thing excepted is not of the ſame genus with the thing from which it is excepted. The argument of *Shaſeï* is that the thing excepted, and that from which the exception is made, are of one and the ſame genus, as being both *valuables*.—The argument of the two diſciples is that in the *former* inſtance, the thing itſelf, and the exception from it, are of the ſame genus, as they are both price:—*deenars* are evidently ſo:—and things eſtimable by weight, or by meaſurement of capacity, are ſo likewiſe, according to their qualities;—in other words, they become ſo upon their qualities being explained.—In the *ſecond* inſtance, on the contrary, (where the exception is *cloth*,) the thing excepted, and that from which the exception is made, are of different genus, as cloth is not price in any ſhape, neither in reſpect of itſelf, nor in reſpect of its deſcription or quality; and accordingly, cloth is not due in any contract of exchange, excepting that of *Sillim*;—(that is, where the price is advanced to the ſeller beforehand.)—Now whatever is *price* has this fitneſs, that it may be ſet in compariſon with *dirms* or *deenars*, and may conſequently, in a proportionate degree, be excepted from them;—whereas, on the other hand, whatever cannot be ſtated as price has not a fitneſs of being compared with *dirms* and *deenars*, and conſequently cannot be ſtated as an exception from them, ſince the proportion cannot be aſcertained.

---

[*] That is, *that it be expreſſed in the ſame ſentence with the acknowledgment.*

[†] *Grain* is united with *money* in accounts, both being conſidered as of the ſame *genus*, ſince both are equally *price*, (that is, *ſtandards of value*,) and may be equally uſed to *repreſent property*. (See *Partnerſhip*, note, Vol. II. p. 309.)

A reſervation of the *will of* God renders the acknowledgment null.

If a perſon make an acknowledgment, with this proviſo "*if it* "*pleaſe* God," he is not then liable for any thing; becauſe (according to *Aboo Yooſaf*,) a reſervation of the pleaſure of God is either an *annulment* of the acknowledgment, or a *ſuſpenſion* of it; and the acknowledgment is null on either ſuppoſition:—or, becauſe (as *Mohammed* argues) it is equivalent to an acknowledgment ſuſpended upon a condition, which is null, as an acknowledgment does not admit of being ſuſpended on a condition, ſince acknowledgment is an *avowal*, which cannot be made conditional; for if it be *true* it cannot be rendered falſe by a default of the condition; or, on the contrary, if it be *falſe* it cannot be rendered true by the fulfilment of the condition:—or, laſtly, becauſe the acknowledgment is ſuſpended on a circumſtance which it is impoſſible to aſcertain.—It is otherwiſe where a perſon ſays "I acknowledge a hundred *dirms* to be due by me to a particular per-"ſon on my death,"—or "upon the arrival of a particular month,"—or "upon the feſtival of breaking Lent,"—becauſe in theſe caſes the acknowledgment is not ſuſpended upon a condition, as this is merely an explanation of the time, and is therefore a *poſtponing* of the thing acknowledged, and not a *ſuſpenſion*; whence it is that if the perſon in whoſe favour the acknowledgment is made can prove the falſity of the poſtponement, the thing becomes due to him immediately.

If a perſon make an acknowledgment of a *houſe* in favour of another, and except the *foundation*, both the houſe and the foundation are the right of the perſon in whoſe favour the acknowledgment is made; becauſe the foundation is included in the houſe from its *dependancy*, and not from its being comprehended in the word *houſe*; and an exception is valid only where it relates to ſomething *comprehended* in the thing expreſſed, according to the meaning of the word. It is to be obſerved that the ſtone in a ring, or the trees of an orchard, ſtand in the ſame relation to the ring or the orchard as the foundation does to a houſe, becauſe neither the word *ring* nor *orchard* applies to the *ſtone* or the *trees*, but are both included merely as *dependants*. It is otherwiſe where a perſon makes an acknowledgment of a houſe in favour of another, excepting from it an *indefinite portion*, or a *ſpecific apartment*, as the exception in theſe caſes relates to a thing which is comprehended in the word *houſe*.

In an acknowledgement regarding a *houſe*, an exception of the *foundation* is invalid.

If a perſon ſay "the foundation of this houſe belongs to me, and "the *Sihn* (meaning the *court-yard*) to a particular perſon;" then the perſon in whoſe favour the acknowledgment is made is entitled to the court-yard, and the foundation is the property of the acknowledger. It is therefore, in fact, the ſame as if the acknowledger had declared that "all the ground free of building is the property of ſuch a perſon." It would be otherwiſe if, inſtead of *Sihn*, he were to mention the word *Arz*, [*earth*,] for in that caſe the foundation as well as the houſe would become the property of the perſon in whoſe favour the acknowledgment is made; becauſe an acknowledgment of the *ground* is an acknowledgment of the *foundation*, as much as an acknowledgement of the *houſe itſelf*; for the *ground* is the *original* thing, and the foundation is included along with it as a *dependant*.—In an acknowledgment of the *ground*, therefore, the foundation is included as a

An exception of the *court-yard* of a houſe is admitted.

dependant, in the ſame manner as it would be included in the houſe itſelf; and hence the exception is invalid.

A reſervation of *non-delivery* of the article is done away by the delivery of it to the acknowledger;

If a perſon acknowledge a debt of a thouſand *dirms* to another, as the price of a ſlave which he had purchaſed from that other, but which he had not received from him, in that caſe, if the ſlave be ſpecific, (as if he had ſaid, "as the price of *this* ſlave,") the perſon in whoſe favour the acknowledgment is made muſt be deſired to deliver up the ſlave and receive a thouſand *dirms*, on pain of forfeiting his claim.—The compiler of the *Hedâya* remarks that this caſe admits of ſeveral ſtatements.—I. That which has been already made, and which proceeds on the ſuppoſition of the acknowledger's aſſertion of the purchaſe and the non-delivery being verified by the perſon in whoſe favour the acknowledgment is made; and in which the law ſtands as above expounded, becauſe the mutual agreement of the parties is equivalent to *actual inſpection*.—II. Where the perſon in whoſe favour the acknowledgment is made denies the ſale of the particular ſlave alleged by the acknowledger, and declares that "the "ſlave in queſtion is his property, and it is *another* ſlave he ſold to "him;"—in which caſe the acknowledger is liable for the amount; ſince he acknowledges a ſum due, on the ſuppoſition of the exiſtence of a ſlave which he had purchaſed; and conſequently upon the other perſon's declaration of the exiſtence of the ſlave ſold, he becomes liable for the amount.

Objection.—It would appear that the acknowledger is not reſponſible for the amount, ſince he acknowledges his debt of a thouſand *dirms* for the purchaſe of a ſpecific ſlave; whereas the perſon in whoſe favour the acknowledgment is made claims the ſaid debt for the ſale of *another* ſlave.—Now as acknowledgment is binding only from the particular cauſe which is aſſigned for it, and the cauſe in this caſe is contradicted by the perſon in whoſe favour the acknowledgment is made, it follows that the acknowledgment is not valid.

Digitized by Google

REPLY.—The contradiction, with reſpect to the *cauſe*, after their mutual agreement as to the exiſtence of the *obligation*, is of no effect. Thus if a perſon acknowledge his reſponſibility to another for a thouſand *dirms*, as "*for goods purchaſed from him*," and the perſon in whoſe favour the acknowledgment is made aſſert the obligation in queſtion to have ariſen from *uſurpation* or *loan*, ſtill the acknowledger is reſponſible for the amount: and ſo alſo in the caſe in queſtion.——III. Where the perſon in whoſe favour the acknowledgment is made declares the ſlave in queſtion to be his own property, and *denies* his having ſold him; in which caſe the acknowledger is exempted from any obligation, becauſe he has acknowledged the property to be due only as *in return for the ſlave*, and conſequently, without that, it is not due from him.—If, however, in this caſe, the perſon in whoſe favour the acknowledgment is made ſhould further declare that "he had ſold *another* ſlave to him [the acknowledger,]" both parties muſt be ſworn; becauſe they are both defendants, as they reciprocally deny the aſſertions of each other:—and upon each taking an oath, the obligation involved in the acknowledgment is annulled, and the ſlave remains with the perſon in whoſe favour the acknowledgment was made.—What is here advanced proceeds on a ſuppoſition of the ſlave being *ſpecific*: for if a perſon acknowledge a debt of a thouſand *dirms*, due to another, for a ſlave that he had purchaſed from him, without ſpecifically deſcribing the ſlave, the acknowledger is in that caſe reſponſible for a thouſand *dirms*:—and his aſſertion, that "he had "not received the ſlave," is not to be regarded, according to *Haneefa*, whether he connect ſuch aſſertion with his acknowledgment, or make it ſeparately; becauſe ſuch aſſertion is a retraction of his acknowledgment; for this reaſon, that in acknowledging a thouſand *dirms* to be due from him, he aſſumes an obligation to that amount; and his denial of the receipt of the indefinite ſlave is repugnant to this obligation, as the price is not due for an indefinite ſlave, becauſe of the uncertainty;—and this, whether the uncertainty be interwoven in the contract, (as where a perſon purchaſes one out of two ſlaves,) or ſupervenient

but in caſe of a diſagreement with reſpect to the article, both parties muſt be ſworn.

If the article be not *ſpecific*, the reſervation is not regarded.

ſupervenient upon it, (as where a perſon purchaſes a ſpecific ſlave out of a great number, and afterwards both the buyer and the ſeller forget the ſlave that had been purchaſed;) becauſe the uncertainty is a bar to the delivery, ſince the purchaſer may always deny whatever ſlave is produced by the ſeller to be the one purchaſed: the uncertainty, therefore, is a bar to the obligation of the price; and ſuch being the caſe, the acknowledger, in denying the receipt of the ſlave, virtually retracts his acknowledgment, which is not allowed.—The two diſciples allege that if the perſon in whoſe favour the acknowledgment is made ſhould verify the acknowledger's aſſertion, by declaring the debt of one thouſand *dirms* to be due for *the price of a ſlave*, the acknowledger's declaration of his not having received the ſlave is in that caſe to be credited; nor is any thing whatever due from him, whether ſuch declaration have been conjoined with the acknowledgement, or otherwiſe.—But if the perſon in whoſe favour the acknowledgment is made *contradict* the acknowledger, with reſpect to the debt being for the price of a ſlave, aſſerting it to be due for ſome other goods, then the acknowledger's declaration of his not having received the ſlave is not to be credited, unleſs it be conjoined with the acknowledgment. Their reaſoning in ſupport of this opinion is that the acknowledger having acknowledged the obligation of the debt upon himſelf, and having explained the cauſe of it, (namely, *ſale*,) it follows that if the perſon in whoſe favour the acknowledgment is made verify his declaration, ſo far as relates to the *cauſe* of the obligation, the ſale is fully proven and eſtabliſhed: the obligation, however, towards the diſcharge of the debt, can be eſtabliſhed only by the receipt of the ſubject of the ſale; and as this is denied by the acknowledger, his aſſertion is therefore credited.—If, on the other hand, the perſon in whoſe favour the acknowledgment is made ſhould contradict the aſſertion of the acknowledger in regard to the *cauſe* of obligation, then the acknowledger's explanation of the cauſe may be regarded as a modification, (that is, he by it modifies the tenor of the firſt part of his ſpeech;) becauſe the tenor of the firſt part of his ſpeech goes to ſhew that an obligation is at preſent actually operating upon him; whereas the latter part, in denying the receipt, tends to prove that no obligation ſubſiſts, ſince the obligation to pay is not eſtabliſhed till after the receipt: the laſt part of the ſpeech, therefore, is an explanatory modification; and a modification is not admitted unleſs it be conjoined with the acknowledgment.

A reſervation of non-receipt of the thing acknowledged muſt be credited.

If a perſon acknowledge the purchaſe of an article from another, at the ſame time declaring that "he has not yet received it," his aſſertion muſt in that caſe be credited, according to all our doctors; becauſe he has merely acknowledged a *contract of ſale*; and an acknowledgment of *ſale* is not an acknowledgment of *receipt*, ſince a receipt does not neceſſarily follow a concluſion of ſale.—It is otherwiſe where a perſon acknowledges the obligation of the *price* of an article purchaſed; for in that caſe his aſſertion of *non*-receipt is not approved, as payment of the price is not obligatory until after the receipt of the goods.

A reſervation of the cauſe of obligation being *illegitimate* does not annul the acknowledgement.

If a *Muſſulman* declare that "he owes ſuch a perſon a thouſand *dirms*, on account of *wine* or *pork*," he is bound for the thouſand *dirms*:—and his explanation of the *cauſe* is not admitted, according to *Haneefa*, whether it be conjoined with the acknowledgment, or otherwiſe; becauſe it is a retraction of his acknowledgment, as the price of *wine* or *pork* cannot be obligatory on a *Muſſulman*; and in the preceding part of his ſpeech he expreſsly declares the exiſtence of an obligation upon him to the amount ſtated. The two diſciples allege that if the explanation be conjoined with the acknowledgment, nothing is due from the acknowledger, ſince the latter part of his ſpeech evidently ſhews this to have been his meaning; it being in fact the ſame as if he had added "*if it pleaſe* God."—To this, however, it may be replied, that there is no analogy between the two caſes, as a reſervation of the *pleaſure of* God is a ſuſpenſion of the matter upon a condition of which it is impoſſible to obtain a knowledge. Beſides, the ſuſpenſion on a condition is a *modification*, and conſequently admiſſible, provided it be conjoined with the ſpeech: in oppoſition to an acknowledgment of the *price* of wine or pork, which is not a ſuſpenſion, but an annulment of the acknowledgment, as has been already explained.

An exception with reſpect to the quality of money acknowledged to be due, is ſet aſide by the counter-aſſertion of the perſon in whoſe favour the acknowledgment is made:

If a perſon declare that "a thouſand *dirms* are due from him to "ſuch a perſon, as the price of certain effects," or "on account of a "*loan*;" and afterwards allege the ſaid thouſand *dirms* to be *Zeyf*, or *Binhirja*, or *Satooka*, or *Arzeez*, and the perſon in whoſe favour the acknowledgment is made allege them to be *Jeed**, in that caſe, according to *Haneefa*, the acknowledger is reſponſible for *Jeed dirms*, whether his latter aſſertion be conjoined with his prior declaration, or otherwiſe.—The two diſciples maintain that the latter aſſertion of the acknowledger is to be credited, in caſe only of its being conjoined with the former, and not otherwiſe.—The ſame difference of opinion obtains where a perſon declares that "he owes another a thouſand "*dirms*," adding that "they are *Zeyf*," or that "another has *lent* "him a thouſand *dirms*, but that they are *Zeyf*," or, that "he owes "another a thouſand *dirms* on account of certain goods, but that they "are *Zeyf*."—(*Zeyf dirms* are ſuch as are not accepted at the public treaſury, but which paſs amongſt merchants: the *Binhirja* is of a kind ſtill worſe, which does not paſs amongſt merchants; and the *Satooka* and *Arzeez* are the worſt of all, and in which the mixture of baſe metal preponderates.) The argument of the two diſciples is that the above explanation is a *modification*, and is conſequently valid if conjoined, in the ſame manner as a *condition*, or an *exception*; for the word *dirm* is literally applicable to *Zeyf*, and metaphorically to *Satooka*: the acknowledger's declaration, therefore, of their being *Zeyf* or *Satooka* is merely a modification, in the ſame manner as if a perſon ſhould declare that "he owes a thouſand *dirms*, but of ſuch a kind that ten "of them weigh five *miſkâls*. The reaſoning of *Haneefa* is that his aſſertion of their being *Zeyf* or *Satooka* is equivalent to a retractation: for an abſolute contract preſuppoſes *dirms* free from defect; whereas *Zeyf* and *Satooka* are both defective. Now the plea of a defect is a retractation of part of the obligation involved in the acknowledgment; and the caſe is therefore the ſame as if the ſeller of a thing ſhould ſay to the purchaſer of it, "I have ſold you a thing with a defect, of "which you were apprized," and the purchaſer deny his knowledge of the defect, in which caſe the denial of the purchaſer is credited, as probability argues in his favour, ſince every abſolute contract ſuppoſes a freedom from defect. Beſides, *Satooka dirms* do not conſtitute *price*; and as a contract of ſale is never concluded but for *price*, it follows that his explanation is, in effect, a *retractation*. (With reſpect to the caſe adduced by the two diſciples of "an acknowledgment of a debt "of a thouſand *dirms*, accompanied with a declaration that the *dirms* "due are of that kind of which ten are equivalent to five *miſkâls*,"— it is to be obſerved, in reply, that the reſervation is admitted, for this reaſon, that the acknowledger, in this inſtance, ſpeaks with a reſervation merely of the *degree* or *proportion* of the *dirms*, and to that the word *dirms* applies.—It is otherwiſe in a deſcription of the *goodneſs* of the *dirms*, for as to this the term *dirms* does not properly apply, it is not conſidered as a reſervation, any more than the exception of the foundation of a houſe.)—The caſe is different where a perſon acknowledges that he is indebted to another a *Koor* of wheat, as the price of a ſlave, but that the wheat is of a *coarſe* kind; becauſe *coarſeneſs*, with relation to *wheat*, is not a *quality* but a *ſpecies*, and an abſolute contract does not neceſſarily require that the wheat be other than *coarſe*.—It is related as an opinion of *Haneefa*, in other books than the *Zâhir Rawâyet*, that in a caſe of *borrowing*, the acknowledger's aſſertion of the *dirms* being *Zeyf* ought to be credited, provided this aſſertion be conjoined with the acknowledgment; becauſe the act of borrowing is not complete until after the ſeizin of the borrower; and

---

* Pure money, of the current ſtandard. The other deſcriptions are explained a little further on.

but not when the exception relates to the *ſpecies* and not to the *quality*.

it often happens that *dirms* are *Zeyf* in borrowing, in the ſame manner as in uſurpation. The reaſoning of the *Zâhir-Rawâyet* is that the common cuſtom is to deal in good *dirms*, and therefore when the explanation is *abſolute*, good *dirms* muſt be underſtood.

An exception with reſpect to the quality is admitted, if the *cauſe* of the obligation be not mentioned by the acknowledger;

If a perſon acknowledge that he owes another a thouſand *Zeyf dirms*, but without reciting the *cauſe*, (ſuch as *ſale* or *loan*,) ſome authorities ſay that his aſſertion with reſpect to the *quality* of the *dirms* is to be credited, according to all our doctors. Others, however, allege that, according to *Haneefa*, it is not to be admitted, becauſe, as the acknowledgment is *abſolute*, it may relate either to *legal* contracts, or to acts of violence, ſuch as uſurpation or deſtruction, which are *illegal*;—and the *former* ſuppoſition is adopted, as acknowledgment is rather to be attributed to a *lawful* than to an *un*lawful cauſe.

and alſo where it is mentioned, if it be either *uſurpation* or *truſt*.

If a perſon acknowledge his having uſurped a thouſand *dirms* from another, or his having received them in depoſit; and afterwards aſſert that the ſaid *dirms* were *Zeyf* or *Binhirja*; in that caſe his aſſertion muſt be credited, whether it be conjoined with or ſeparate from the acknowledgment; becauſe mankind are accuſtomed to uſurp whatever they can find, and to place in depoſit whatever they poſſeſs *; and therefore neither of theſe acts neceſſarily infers the *dirms* to have been *Jeed*, (that is, *good*.) The acknowledger's aſſertion, therefore, of the *dirms* being either *Zeyf* or *Binhirja* is equivalent to an explanation of the ſpecies, and is conſequently admitted, even though it ſhould not have been conjunctively made.—For the ſame reaſon, alſo, if an uſurper produce a defective article, as the thing he had uſurped,—or a truſtee produce a defective article, as the thing he had received in depoſit,—the declaration ſo made muſt in either caſe be admitted.—It is reported, from *Aboo Yooſaf*, that in caſe of an acknowledgment of uſurpation, the acknowledger's aſſertion of the *dirms* being *Zeyf* ought not to be credited where it is made ſeparately from the acknowledgement; becauſe of the analogy of this caſe to that of a loan, on the principle of ſeizin inducing reſponſibility in both caſes, that is, in a caſe either of uſurpation or of loan;—for he holds that, in a caſe of *loan*, the acknowledger's aſſertion of the money borrowed being *Zeyf* cannot be credited, if ſeparately made; and ſo alſo in the caſe in queſtion.

---

* Without any regard to the *ſpecies* or *quality*.

Acknowledgment with reſpect to the depoſit or uſurpation of *Satooka dirms.*

IF a perſon acknowledge his uſurpation of a thouſand *dirms*, or his receipt of that ſum, in depoſit, and aſſert that they were *Satooka*, in that caſe his aſſertion muſt be credited, if conjoined with the acknowledgment; but not otherwiſe; becauſe, although *Satooka* be not in reality a ſpecies of *dirms*, ſtill it is cuſtomary to apply that word to them *figuratively*:—the mention of this term, therefore, is a *modification*, and muſt conſequently be *conjoined.*

An exception of a *part* from the *whole* is not to be credited, if made *ſeparately*;

IF a perſon declare that "he owes ſuch an one a thouſand *dirms*, "on account of certain goods," or that "he has borrowed a thouſand "*dirms*," or that "he has received a thouſand *dirms* in depoſit," or that "he owes a thouſand *Zeyf dirms*," or that "he has uſurped a "thouſand *dirms*,"—and he afterwards except a particular number of *dirms* from the obligation,—in none of theſe caſes is his aſſertion to be admitted, if made ſeparately from the acknowledgment,—whereas if it be conjoined with the acknowledgment it muſt be admitted, as the aſſertion is in this caſe an *exception*, and an exception is valid when conjunct. It is otherwiſe if he aſſert the *dirms* to be *Zeyf*, as a reſervation of this nature is not valid, ſince *Zeyf* relates to *quality*; but expreſſion applies ſolely to *quantity*, not to *quality* *; and exception is not admitted with reſpect to any matter but what may be preciſely expreſſed. It is to be obſerved, however, that if the exception

unleſs this ariſe from

---

* Meaning, perhaps, that *number* admits of a preciſe and definite expreſſion, whereas *quality* can be aſcertained only by *examination* and *inſpection.*

ſhould

ſome unavoidable accident.

ſhould have been disjoined by neceſſity, (ſuch as by a *cough*, or a *ſhortneſs of breath*,) it is then conſidered as *conjunct*, becauſe of the interruption being *unavoidable*.

In an acknowledgement of *uſurpation* a *damaged* article muſt be accepted.

If a perſon acknowledge the uſurpation of *cloth*, and then produce *damaged* cloth, it muſt nevertheleſs be admitted, as uſurpation is not reſtricted to *perfect* things.

Where the property is loſt, if the acknowledger allege a *truſt*, and the other party aſſert an *uſurpation*, the acknowledger is reſponſible:

If *Zeyd* ſay to *Omar* "I took from you a thouſand *dirms* by way "of truſt, and they are loſt," and *Omar* reply "no; you took them "by way of uſurpation;" in that caſe *Zeyd* is reſponſible for the loſs." If *Zeyd*, on the contrary, ſay "you gave me a thouſand *dirms* by way "of *depoſit*, and they are loſt," and *Omar* reply "no; you took "them by way of *uſurpation*;" in that caſe *Zeyd* is not reſponſible for the loſs. The difference between theſe two caſes is, that *Zeyd* (in the *former* caſe) firſt acknowledges a thing which is a cauſe of reſponſibility, namely, *taking*, and afterwards aſſerts an exemption from reſponſibility, by declaring that he held it as a *depoſit*. Now a *depoſit* implies the conſent of *Omar*; but *Omar* denies his aſſent; and therefore, as *defendant*, his aſſertion ſupported by an oath muſt be credited. In the *ſecond* caſe, on the contrary, *Zeyd* does not make any acknowledgment ſubjecting himſelf to reſponſibility; becauſe, in uſing the word *given*, he refers the action to *Omar*, and not to himſelf; and no one is ſubject to reſponſibility for the actions of another. *Omar*, on the other hand, aſſerts, againſt *Zeyd*, a cauſe of reſponſibility, namely, *uſurpation*; which *Zeyd* denies; and conſequently, as defendant, his word ſupported by an oath muſt be credited.—It is to be obſerved that the word *receive*, in this caſe, is equivalent to *take*; and the word *remove* to that of *give*.—Thus, if the acknowledger, inſtead of *taken*, ſhould ſay that he had *received* a thouſand *dirms*, he is in that caſe ſubject to reſponſibility.—If, on the contrary, he ſay "you have *removed* "to me," inſtead of "you have *given* me," he is not in that caſe ſubject to reſponſibility.

Objection.—Neither giving nor removing can be carried into execution without receipt on the part of the other party. An acknowledgment of *giving* or of *removing*, therefore, is virtually an acknowledgment of *receiving*; and conſequently it would appear that, in either caſe, the acknowledger is ſubject to reſponſibility.

Reply.—The *giving* and *removing* of one thing to another is ſometimes performed by a mere *relinquiſhment* of the right in an article, (that is, by a non-prevention of the other from taking it;) and ſometimes by placing the article before the other.—*Giving* and *removing* may therefore be carried into execution without a *receipt* or *taking*; and hence an acknowledgment of giving or removing does not involve an acknowledgment of receiving or taking. Beſides, admitting that receipt is eſtabliſhed from *giving* or *removing*, ſtill it is eſtabliſhed only by *implication*; and whatever is eſtabliſhed by implication is adopted only in caſes of neceſſity; but there exiſts no neceſſity, in the preſent inſtance, to eſtabliſh reſponſibility for the loſs.

but not if he aſſert a *truſt*, and the other aſſert a *loan*.

If a perſon ſay to another "I have *taken* a thouſand *dirms* from you "by way of *depoſit*,"—and the other reply "no; you have taken them "by way of *loan*,"—in this caſe the aſſertion of the acknowledger, notwithſtanding his uſe of the word *taking*, muſt be admitted: for both parties are agreed in the taking of the *dirms* with the conſent of the perſon in whoſe favour the acknowledgment is made; but *he* aſſerts a *loan*, (which is a cauſe of reſponſibility,) whereas the acknowledger aſſerts a *depoſit*.—There is an evident difference between this caſe and that which has already been explained, in which the perſon in whoſe favour the acknowledgment is made aſſerts uſurpation; becauſe that perſon ſtands as *defendant*, ſince he denies his conſent.

Caſe of acknowledgement of the

If a perſon ſay "this ſum of a thouſand *dirms*, my property, was "in truſt with ſuch a perſon, and as ſuch I have taken it from him," and receipt of money, with a reſervation of its being the property of the *acknowledger.*

and the other deny this, and declare the ſaid ſum to be *his own* property; he is in that caſe entitled to take it from the acknowledger; becauſe the acknowledger confeſſes that he took the ſum in queſtion from him on the claim of its being *his own property*, which the other denies; and hence his aſſertion, as defendant, muſt be credited.

Caſe of acknowledgement of the receipt of *ſpecific property*, with a reſervation to the ſame effect.

If a perſon affirm that he had hired out an animal of carriage to another, who, after riding upon him, had returned it to him,—or, that he had hired out a garment to another, who, after wearing it, had returned it to him,—and the other contradict this, declaring the ſaid animal or garment to be his own property, in that caſe, according to *Haneefa*, the aſſertion of the acknowledger muſt be admitted, upon a favourable conſtruction.—The two diſciples maintain that the aſſertion of the other party muſt be credited; and this is agreeable to analogy.—(The ſame difference of opinion alſo obtains where, inſtead of *hiring out*, the acknowledger ſays that he had *lent* his horſe to the other to ride on, or his houſe to reſide in,—or, had given his garment to another *to mend*, for hire,—and had afterwards reſumed the article, and the other declare it to be his property.—(Analogy would ſuggeſt (as has been already mentioned in the example of *depoſit*) that the acknowledger, in theſe caſes, has confeſſed his having taken and poſſeſſed himſelf of things which, however, he aſſerts to be *his own property*; but which is denied by the perſon in whoſe favour the acknowledgment is made; whoſe aſſertion, as defendant, muſt therefore be credited.—The reaſons for a more favourable conſtruction, in this particular, are twofold.—First, the eſtabliſhment of the *receipt*, in caſes of *hire* and of *loan*, is not admitted from *itſelf*, but from *neceſſity*; (that is, from the neceſſity of anſwering the object of the contract, namely, the *uſufruct* of the article;) and the effect is therefore reſtricted to the point of neceſſity. Hence the acknowledgment of *hire* or of *loan* does not involve the acknowledgment of *receipt*, as in the caſe of a *depoſit*.—Secondly, as in the caſes of hire, loan, and reſidence, the poſſeſſion of the perſon in whoſe favour the acknowledgment is made is eſtabliſhed ſolely by the avowal of the acknowledger, his explanation of the nature of that poſſeſſion muſt be admitted. It is otherwiſe in the example of *depoſit*, ſince a depoſit may be made without a delivery; as where, for inſtance, a perſon's gown is blown, by the wind, into another perſon's houſe, in which caſe the gown remains a depoſit with the owner of the houſe, although no formal delivery have been made. The author of this work obſerves that the point upon which the difference between the caſes of *hire*, *loan*, or *reſidence*, and that of depoſit, (as before explained,) turns, is not that the word *take* is recited in the *latter* and not in the *former* caſes; becauſe this word is uſed by *Mohammed*, in the caſe in queſtion, in the *Mabſoot*, treating of acknowledgments;—but that it reſts upon the two reaſons for a *favourable* conſtruction of the law in this particular, as recited above.

IF a perſon ſay "I have received from ſuch a perſon his acquittance, of a thouſand *dirms* which he owed me,"—or "I lent ſuch a perſon a thouſand *dirms*, and have received back the ſame,"—and the other deny the previous exiſtence of the debt, our doctors are, in that caſe, unanimouſly of opinion that the aſſertion of the perſon in whoſe favour the acknowlegment is made is to be credited; becauſe a debt muſt be diſcharged by means of a ſimilar; and this cannot otherwiſe be accompliſhed than by the creditor's receiving a portion of the debtor's property, equivalent to the debt, in ſuch a manner as may induce reſponſibility.—The acknowledger, therefore, in ſaying that he had received from the other an acquittance of the debt which that other owed him, confeſſes a circumſtance which is a cauſe of reſponſibility; and he afterwards claims the right of property in the ſame, in virtue of its having been given to him in exchange for his debt, which is denied by the other; he therefore ſtands as defendant, and his aſſertion muſt conſequently be credited.—It is otherwiſe in aſſertions of *hire*, *loan*, or *reſidence*, because the thing ſeized, in thoſe inſtances, is an identic article, for which the acknowledger claims the *hire*, or ſo forth: there is therefore an evident difference between the caſes.

Caſe of diſpute with reſpect to immovable property.

If a perſon acknowledge that another has cultivated a particular piece of land, or built a particular houſe, or planted grapes in a particular orchard, the ſaid land, houſe, or orchard being in the poſſeſſion of the acknowledger, and the perſon in whoſe favour he acknowledges claim the *property* of theſe things, and the acknowledger, on the other hand, declare them to be *his own* property, and that the other, in the *cultivation*, *building*, or *planting*, had only acted by *his deſire*, as his *aſſiſtant*, or as his *hireling*—in that caſe the aſſertion of the acknowledger muſt be credited, according to all our doctors; becauſe he does not make an acknowledgment of the poſſeſſion on behalf of the other, but merely of the abovementioned acts as performed by that other, and theſe do not argue a right of poſſeſſion, ſince the perſon in whoſe favour the acknowledgment is made might have lawfully performed theſe acts upon things that were in the poſſeſſion of the acknowledger. The caſe, therefore, is the ſame as if a perſon were to declare that a particular taylor had ſowed his garment for half a *dirm*, but that he had not received the garment from the taylor; and the taylor claim the property of the garment: for there the acknowledgement ſo made is not ſuppoſed to allude to the poſſeſſion on the part of the taylor, and therefore the aſſertion of the acknowledger is credited; and ſo alſo in the caſe in queſtion. It is otherwiſe if the acknowledger ſay that " he has received poſſeſſion from the taylor;" for concerning that caſe there is a diſagreement amongſt our doctors, ſimilar to what has been deſcribed.

CHAP.

CHAP. III.

Of Acknowledgments made by *Sick* Perſons *.

Debts acknowledged on a death-bed (without aſſigning the *cauſe* of them) are preceded by debts of every other deſcription.

If a perſon, in his laſt illneſs, acknowledge a debt, as being due to another, and he alſo owe other debts contracted during *health*, or debts contracted during his *ſickneſs* for *known cauſes*, (ſuch as the *purchaſe* or the *deſtruction* of property,) and of which proof may be obtained by other means than through his acknowledgment, or be indebted to his wife married during his ſickneſs, for her *Mihr-Miſl*, (or *proper* dower,)—all theſe debts ſo contracted during health or ſickneſs have a preference to that other which he ſo acknowledges during his ſickneſs, and of which the cauſe is unkown. *Shafeï* maintains that the debts of the healthy and the ſick are alike valid, ſince acknowledgment, which is the cauſe of both, is in both inſtances equal, in as much as it is derived from the underſtanding. *Debt*, moreover, and the *reſponſibility of the perſon* to which the obligation relates, are capable of comprehending the rights of a variety of perſons. An acknowledgment of debt, therefore, reſembles the ſettlement of a contract of purchaſe or of marriage;—that is to ſay, if a ſick perſon purchaſe goods, and remain indebted for the price,—or marry on a proper dower, and remain indebted for the ſame,—debts ſo contracted are upon an equal footing with debts contracted during health; and ſo alſo in the caſe in queſtion.—The argument of our doctors is that acknowledgment is not valid when it tends to prejudice the right

---

* By *ſick* perſons, throughout the whole of this chapter, is meant ſuch as are affected with a mortal diſorder.—(The analogical principle on which the law upon this head proceeds is ſet forth in treating of the *divorce of the ſick*.—See Vol. I. p. 279.)

Digitized by Google

of another; and the acknowledgment of a ſick perſon *does* induce this conſequence, ſince the rights of the creditors of debts contracted during his health are connected with his property, in as much as they may ſeize it for the payment of what is owing to them;—whence it is that deeds of a *gratuitous* or *benevolent* nature are not allowed, in a ſick man, beyond the extent of a third of his eſtate.—It is otherwiſe with reſpect to marriage on a *proper* dower*, as marriage is one of the moſt eſſential wants of a ſick perſon, ſince in the ſame manner as man is impelled to *his own* preſervation, ſo alſo is he impelled to the propagation of his ſpecies.—It is otherwiſe, alſo, with reſpect to the purchaſe of property for an equivalent price; becauſe the right of the creditors is connected with the *ſubſtance* of the property, and not with the *form* of it; and in an inſtance of purchaſe the ſubſtance is extant.—During health, moreover, the right of the creditors is connected with his *perſon*, not with his *property*, ſince whilſt he is in a condition to acquire property, it is ſuppoſed that the property will increaſe:—a ſtate of ſickneſs, on the contrary, is a ſtate of inability, and therefore the right of the creditors is then connected with his property†.

Objection.—If the connection of debts contracted during health, with the property of the ſick perſon, be a bar to the obligation of other debts, becauſe of the priority of the former, it follows that if a ſick perſon, having made an acknowledgment in favour of a perſon, ſhould afterwards make an acknowledgment in favour of another, it is not valid, becauſe the firſt acknowledgment is preferable, as being connected with his property; whereas, according to law, they are both valid.

Reply.—The whole period of ſickneſs is conſidered as one and the ſame, becauſe the whole of it is a time of reſtriction, and therefore

---

* That is to ſay, without any *particular ſpecification* of a dower: for if a ſick perſon marry upon a *ſpecified* dower, the agreement holds to the extent only of *one third* of his whole property.

† What is here ſaid merits ſome attention, as it elucidates a very important point in the laws of property.

fore *one* part or period of it is the ſame as *another*.—It is otherwiſe with reſpect to *health*, as health is not a period of reſtriction, and therefore deeds are then lawful, whereas, ſickneſs being a time of reſtriction, many deeds are then unlawful.

—It is to be obſerved that debts contracted during ſickneſs, of which the cauſe of the obligation is known, are preferable to debts of ſickneſs which are ſupported merely upon acknowledgment; becauſe the former are free from ſuſpicion. It is alſo to be obſerved that debts of ſickneſs, of which the cauſe is *known*, are upon a foot of equality with debts of *health*, neither having a preference over the other;—a debt of a *proper* dower, becauſe of the neceſſity for marriage; and debts contracted on account of purchaſe, or of a loan, becauſe of the exiſtence of an equivalent.—The right of the creditors, moreover, is connected merely with the *ſubſtance*; and as, in the eſtabliſhment of theſe debts, there is no doubt or ſuſpicion, they are therefore on a foot of equality with debts of health.

A dying perſon cannot concede any ſpecific property by acknowledgement;

IF a ſick perſon make an acknowledgment in favour of any perſon, of ſomething he holds in his hand, ſuch acknowledgment is not valid, becauſe of the injury it induces to the creditors, whoſe right is connected with that thing.

nor make a *partial* diſcharge of his debts: (excepting thoſe contracted during his illneſs.)

IT is not lawful for a ſick perſon to diſcharge the debts of *part* of his creditors, becauſe ſuch partial diſcharge is a deſtruction of the right of the others: and in this reſpect the creditors of *health* and of *ſickneſs* are upon an equality:—excepting, however, where the ſick perſon reſtores ſomething he may have borrowed during his ſickneſs, or pays the price of ſomething he may have purchaſed during his ſickneſs; and the obligation admits of being proved by witneſſes:—in other words, if a perſon borrow, during his laſt illneſs, a thouſand *dirms*, and keep the ſame by him, or purchaſe any thing with them to that value, and afterwards repay the loan, or pay the price of the purchaſe, it is lawful, where it admits of being proved by evidence, becauſe

theſe

theſe payments are attended with no injury to the creditors, as the acknowledger has obtained an equivalent for what he pays.

A debt acknowledged upon a death-bed is diſcharged after all other debts.

If, after the diſcharge of the whole of the *preferable* debts, there ſtill remain ſome property of the ſick man's eſtate *, ſuch reſidue muſt be applied to the diſcharge of the debts acknowledged during his ſickneſs; becauſe ſuch acknowledgments were in themſelves valid, and having been annulled merely from a regard to the rights of the creditors, they reſume their original validity when the bar to their operation is removed.

If there be no other debts, it is diſcharged previous to the diſtribution of the inheritance.

The acknowledgments of debt, by a ſick perſon, who does not owe any debts of health, are valid, as they occaſion no injury to others.—In ſuch caſe, alſo, the ſaid debts are preferable to the claims of the heirs; becauſe *Omar* has ſaid, "whenever a ſick perſon ac-"knowledges debts, they muſt be conſidered as obligatory, and diſ-"charged from his effects."—Beſides, the diſcharge of his debts is a matter of neceſſity; and the right of the heirs is connected with his eſtate on the ſole condition of its being *free from incumberance*; whence it is that the diſcharge of the funeral expences precedes the right of the heirs, as that is alſo a matter of neceſſity.

An acknowledgment in favour of an heir is not valid, unleſs admitted by the co-heirs;

If a ſick perſon make an acknowledgment in favour of any of his *heirs*, it is not valid, unleſs it be verified by the other heirs.—*Shafeï*, in one report of his opinion upon this point, ſays that it is valid; becauſe acknowledgment is the manifeſtation of an eſtabliſhed right; and the probability is that the acknowledger has ſpoken truth, ſince reaſon forbids falſehood, more particularly in time of ſickneſs.—Beſides, as religion and juſtice, when joined to reaſon, muſt reſtrain a man

from

---

* This caſe ſuppoſes a diſtribution of the effects of the acknowledger, after his deceaſe; and the term *ſick man* is applied to the defunct, in this inſtance, merely to diſtinguiſh him, as having acknowledged debts whilſt he was ſick of a mortal illneſs.

Digitized by Google

from falſehood, the acknowledgment of a ſick perſon in favour of his *heir* is like an acknowledgment in favour of a *ſtranger*;—or, like an acknowledgment in favour of an *additional* heir,—(as if a perſon ſhould acknowledge that "a particular perſon is his ſon,"—which acknowledgment is valid, notwithſtanding it diminiſh the rights of the other heirs;)—or, like an acknowledgment of the deſtruction of a depoſit, the property of an heir; (as where, for inſtance, a perſon lodges a depoſit of one thouſand *dirms*, during either health or ſickneſs, with his father, in the preſence of witneſſes, and the father afterwards, whilſt dying, acknowledges that he had deſtroyed the depoſit of his ſon,—in which caſe the acknowledgment is valid, and the perſon in whoſe favour it is made is entitled to a thouſand *dirms* from the eſtate of the acknowledger, although it diminiſh the right of the heirs;—and ſo alſo in the caſe in queſtion.)—The arguments of our doctors upon this point are threefold.—First, the prophet has ſaid "*there is no legacy to an* HEIR, *and no acknowledgment of a* DEBT *in favour of an* HEIR."—Secondly, as the right of the heirs is connected with the property of a perſon in his laſt ſickneſs, (on which account he is not permitted, at that period, to do any deed of gratuity or affection,) an acknowledgment in favour of *ſome* of the heirs is invalid, as being prejudicial to the right of the *others*.—Thirdly, as the ſick perſon, in his laſt illneſs, is above the want of his property, and as affinity is the cauſe of connecting the right of the whole of the heirs with the property, when the want of it no longer exiſts in the ſick perſon, it follows that at ſuch period an acknowledgment in favour of a part of them muſt be an injury to the whole. This connexion, however, does not operate with reſpect to *ſtrangers*, becauſe of the neceſſity the ſick man was under, during health, of entering into concerns* with them; for many of the concerns of the ſick (ſuch as *purchaſe*, *ſale*, and the like) are entered into with ſtrangers during

---

* Arab. *Moûlikât*; meaning concerns of a *ſuſpended* nature,—ſuch as purchaſe with a ſuſpenſion of payment of the *price*, and ſo forth.

health; and if their acknowledgment of theſe during their ſickneſs were not valid, people would be cautious of dealing with them during their health, and their affairs would of conſequence ſuffer.—Such an acknowledgment, therefore, is preferable to the claims of the heirs.—It is to be obſerved that the connexion here mentioned does not operate to the deſtruction of a ſick man's acknowledgment of parentage, by which an additional heir is occaſioned; becauſe the ſick man alſo is neceſſitous in this particular, as parentage exiſts after death, and a man is held to continue in exiſtence, after death, in the perſon of his offſpring; whence parentage is one of the wants of the dead.

and ſo alſo of an acknowledgment in favour of *a part* of the heirs.

If a ſick man make an acknowledgment in favour of *part* of his heirs, and the others verify the ſame, ſuch acknowledgment is valid, becauſe of the removal of the only obſtacle, namely, the connexion of the right of the other heirs with his property, which they themſelves relinquiſh.

The acknowledgment of a dying perſon in favour of a *ſtranger* is valid, to the amount of the *whole eſtate*:

If a ſick perſon make an acknowledgment in favour of a ſtranger, it is valid, although it be tantamount to the whole of his property,—becauſe *Omar* has ſaid "*the acknowledgment of debt by a ſick perſon is* "*valid*; *and the debt is due from the whole of his eſtate*;"—(as before quoted.)—Analogy would ſuggeſt that the acknowledgment does not operate in a degree beyond the *third* of his property; as it is in that degree only that the LAW admits of the deeds of a ſick man with regard to his property.—Our doctors, however, remark upon this that as the *acts* of a ſick perſon are valid with reſpect to a third of his property, it follows that the *acknowledgment* of a ſick perſon is valid in the ſame proportion; and it then becomes valid with reſpect to the remaining thirds alſo; becauſe, upon the ſick perſon acknowledging one third of his property to belong to another, it becomes from that moment the property of that other; and as the remaining two thirds then form the whole of the property of the acknowledger, he may lawfully make an acknowledgment of one third of it, and ſo on, until nothing remain.

OBJECTION.—It would hence appear that bequeſt to the extent of the whole property is alſo valid.

REPLY.—In bequeſt, the third of the eſtate does not become the property of the legatees, until after the death of the teſtator; and accordingly, they cannot claim their legacies before that event. It is otherwiſe with reſpect to an acknowledgment of debt, as the perſon in whoſe favour the acknowledgment is made becomes immediate proprietor.—There is therefore an evident diſtinction between the caſes.

But it is annulled by a ſubſequent acknowledgment of the ſtranger being his *ſon*.

IF a ſick perſon make an acknowledgment in favour of a ſtranger, and afterwards declare that "he is his ſon," the parentage is eſtabliſhed accordingly, and the acknowledgment is null.—If, on the contrary, a ſick perſon make an acknowledgment in favour of a ſtrange woman, and afterwards marry her, the acknowledgment does not become null. The difference between theſe two caſes is that, in the *former*, upon the ſick perſon declaring the other to be his ſon, his parentage is eſtabliſhed in the acknowledger from the inſtant of conception in the mother's womb; whence it is evident that the perſon in whoſe favour the acknowledgment was made was the heir of the acknowledger at the period of his acknowledgment; and conſequently, that he has made an acknowledgment *in favour of his own ſon*, which is invalid of courſe.—It is otherwiſe with reſpect to marriage; for, as the relationſhip produced by that takes place only from the time of contracting it, it follows that the woman was not the acknowledger's heir at the time of the acknowledgment; and conſequently, that his acknowledgment in her favour remains valid.

Caſe of acknowledgement in fa-

IF a ſick perſon repudiate his wife by three divorces, and then make an acknowledgment of debt due to her, and die*, ſhe is in that

---

* Before the expiration of her *edit*.

caſe

vour of a *re-pudiated wife.* caſe entitled to which ever of the two claims (namely, her portion of inheritance, or the amount of the debt acknowledged) may be the ſmalleſt.—The reaſon of this is that both the woman and the man are in this caſe liable to ſuſpicion; for as the *edit*, or term of probation, was not expired, the woman, after his death, is an heir, and an acknowledgment in favour of an heir is not valid.—Hence there is a poſſibility that the woman may have requeſted her divorce as the means of her acquiring a right to the acknowledgment; and that the huſband may have divorced her with the view of giving her more than ſhe was entitled to as an heir. As, therefore, both huſband and wife are liable to ſuſpicion, the *ſmalleſt* of the two claims is decreed to the woman, ſince concerning that there can be no ſuſpicion*.

SECTION.

MISCELLANEOUS CASES.

Acknowledgments of *parentage* with reſpect to infants.

If a perſon acknowledge the parentage of a child who is able to give an account of himſelf, ſaying " this is my ſon," and the ages of the parties be ſuch as to admit of the one being the child of the other, and the parentage of the child be not well known to any perſon, and the child himſelf verify the acknowledgment, his parentage is eſtabliſhed in the acknowledger, although he [the acknowledger] be *ſick*; becauſe the parentage in queſtion is one of thoſe things which affect the *acknowledger himſelf* only, and no other perſon.—It is made a condition, in this caſe, that the ages of the parties be ſuch as to admit of the relation of parentage; for if it were otherwiſe, it is evident that the

---

* See this treated of at large under the head of *the divorce of the ſick.* (Vol. I. p. 279.)

Digitized by Google

acknowledger has ſpoken falſely.—It is alſo made a condition, that the parentage of the boy be unknown; for if he be known to be the iſſue of ſome other than the acknowledger, it neceſſarily follows that the acknowledgment is null.—It is alſo made a condition, that the boy verify the acknowledgment; becauſe he is conſidered as his own maſter, as he is ſuppoſed able to give an account of himſelf.—It were otherwiſe if the boy could not explain his condition; for then the acknowledgment would have operated without his verification.—It is to be obſerved that the acknowledgment, in this inſtance, is not rendered null by ſickneſs; becauſe parentage is an *original* and not a *ſupervenient* want. By the eſtabliſhment of the parentage, therefore, the boy becomes one of the acknowledger's heirs, in the ſame manner as any of his other heirs.

Acknowledgments with reſpect to *parents*, children,

IF a perſon acknowledge his *parents* or his *ſon*,—(as if he ſhould declare that "a certain man is his father," or, that "a certain woman is his mother," or, that "a certain perſon is his ſon,"—and the ages of the parties admit of thoſe relations,)—or, if a perſon acknowledge a particular woman to be his wife, or a particular perſon to be his *Mawla*, (that is, either his *emancipator*, or his *freedman*,)—in all theſe caſes the acknowledgment is valid, as affecting only himſelf, and not any other.—In the ſame manner, alſo, if a woman acknowledge her parents, or her huſband, or her *Mawla*, it is valid, for the ſame reaſon.—A woman's acknowledgment of a *ſon*, however, is not valid, as ſuch acknowledgment affects her huſband, in whom the parentage is eſtabliſhed: her acknowledgment of a *ſon*, therefore, is not valid, unleſs the huſband confirm her declaration, (as the right appertains to him,) or, that it be verified by the birth being proven by the evidence of one midwife, which ſuffices in this particular.—(Concerning the acknowledgments made by women of their children, there are various diſtinctions, as ſet forth at large in treating of *claims*.)—It is to be obſerved that in all theſe caſes the confirmation of the party concerning whom the acknowledgment is made is requiſite, excepting in

and *patrons*, are valid,

if confirmed by the parties.

in the acknowledgment with reſpect to a *child*, when ſo young as not to be able to give any account of himſelf.—It is alſo to be obſerved that the confirmation concerning *parentage* is valid, although made *after the death* of the acknowledger; becauſe the relation of parentage exiſts after death.—In the ſame manner, alſo, the confirmation of a wife, after the death of her huſband, is valid; becauſe the *edit* is one of the effects of marriage; and that exiſts after the death of the huſband, whence it may be ſaid that the marriage *itſelf* endures in one ſhape; and therefore the confirmation of the wife, after the death of her huſband, is valid.—So alſo (in the opinion of the two diſciples) the confirmation of the *huſband* is valid, after the death of the wife; becauſe *inheritance*, which is one of the effects of marriage, exiſts after the death of the wife; whence the *marriage itſelf* endures, in *one* ſhape; for which reaſon his confirmation is valid.—According to *Haneefa* the confirmation of the huſband is not valid, becauſe the marriage expires upon the death of the wife; on which account it is not lawful for a huſband to waſh the body of his wife after her death.—In regard to the aſſertion of the two diſciples, that "the marriage "endures, in one ſhape, after the death of the wife, becauſe of in-"heritance," it is not admitted; for the inheritance does not take place until *after* death, and was therefore a nonentity at the time of the acknowledgment.—Now a confirmation, in order to be valid, muſt be directed to the period of the acknowledgment; and as, at that period, the inheritance did not exiſt, it is therefore invalid.

The acknowledgment of a dying perſon, with reſpect to an *uncle* or *brother*, entitles them to inherit, (if he have no other heirs,) but does not eſtabliſh their parentage.

If a perſon acknowledge an *uncle* or a *brother*, ſuch acknowledgement is not credited, ſo far as relates to the eſtabliſhment of the parentage, becauſe of its operating upon another than the acknowledger. If, therefore, the acknowledger have a *known heir*, whether near or remote, the whole of the inheritance goes to him, and not to the perſon in whoſe favour the acknowledgment is made, ſince the parentage not having been eſtabliſhed on the part of the acknowledger, no obſtacle can thence ariſe to the inheritance of a known heir.—If,

however,

however, the acknowledger have no other heir, the perſon in whoſe favour he makes acknowledgment is in that caſe clearly entitled to the inheritance, as every perſon has full power over his eſtate when he had no heirs; whence it is that a perſon may bequeath the *whole* of his property in legacy, provided he have no heirs. The perſon in whoſe favour the acknowledgment is made is therefore in this caſe entitled to the whole of the property, although the parentage be not proven; (that is, although he be not admitted to be the brother or uncle of the acknowledger;) as that would tend to affect *another*; namely, the father or *grandfather* of the acknowledger *.—It is to be obſerved that the acknowledgment, in this caſe, is not in reality a *legacy*; becauſe, if a man ſhould acknowledge a particular perſon to be his *brother*, and afterwards bequeath the whole of his property to another, the legatee would in that caſe be entitled only to *one third* of the whole of the property; whereas, if the acknowledgment had been in reality a *legacy*, the perſon in whoſe favour the acknowledgment is made, and the legatee, would in that caſe ſhare the whole of the property equally between them. The acknowledgment, however, *is equivalent* to a legacy, on this conſideration, that the perſon in whoſe favour it is made is entitled to the property merely becauſe of the *declaration of the acknowledger*, and not from any other cauſe whatever, as in *bequeſt*: for which reaſon, if a ſick man ſhould acknowledge a certain perſon to be his *brother*, and this perſon confirm the ſame; and the acknowledger afterwards deny his right of inheritance, and bequeath the whole of his property to ſome other, the legatee is entitled to the whole of his eſtate;—or, that, if he ſhould not bequeath his property to another, the whole of his eſtate goes to the *public treaſury*; becauſe retraction is in this caſe valid, for this reaſon, that the parentage, which annuls the validity of the acknowledgment, is not eſtabliſhed.

---

* Becauſe, if he were admitted to be actually the *uncle* or the *brother* of the acknowledger, that would induce, in his favour, a claim of inheritance from them alſo.

The acknowledgment of a *brother*, by the heir, entitles to inheritance, but does not eſtabliſh parentage.

If a perſon die, and his ſon acknowledge another to be his *brother*, the parentage of the perſon in whoſe favour the acknowledgment is made is not eſtabliſhed, but he is entitled to a ſhare in the inheritance with the acknowledger;—becauſe the acknowledgment in queſtion involves two conſequences; namely, the eſtabliſhment of the parentage, which, as affecting another, does not take place,—and the participation of the acknowledgee in the property, which, being a power he poſſeſſes, as affecting himſelf only, does therefore take place.—In the ſame manner as where a purchaſer acknowledges that the ſlave he has bought had been emancipated by the ſeller, in which caſe the acknowledgment (ſo far as it relates to the *ſeller*) is not to be credited; and on this account the buyer is not entitled to retake the purchaſe-money from the ſeller:—the acknowledgment, however, is credited ſo far as it relates to *himſelf*, and therefore the ſlave is free.

Caſe of acknowledgment, made by a co-heir, of the partial payment of a debt owing to the perſon from whom the inheritance deſcends.

If a perſon, to whom a debt is owing by another of one hundred *dirms*, ſhould die, leaving two ſons, and one of theſe acknowledge that his father had received payment of fifty *dirms* of the ſaid debt, in that caſe the acknowledger is not entitled to any thing; and the other is entitled to the remaining fifty *dirms*;—becauſe, as the acknowledger has here made an avowal which operates upon himſelf, his brother, and the deceaſed, it is therefore valid only ſo far as it relates to *himſelf*; and not with reſpect to any other; for his acknowledgment that the deceaſed had received fifty *dirms* of the debt, is equivalent to an acknowledgment that the deceaſed owed fifty *dirms*, ſince the receiving payment of a debt cannot be eſtabliſhed but by the receipt of a thing involving reſponſibility;—(that is to ſay, by the receipt of a thing which induces reſponſibility on the receiver, ſo as that this reſponſibility may ſtand as a debt againſt him, and that then a mutual liquidation may take place, by the oppoſition of the debt of one to the debt of the other.)—Upon the other brother, therefore, contradicting the acknowledgment, the debt which it in conſequence eſtabliſhed upon the deceaſed, is oppoſed to the ſhare of the acknowledger, in conformity with the tenets of our doctors; for with them it is an eſtabliſhed tenet that if one of the heirs acknowledge a debt due by the deceaſed, and the other heirs contradict the ſame, the debt is in that caſe charged to the ſhare of the acknowledger.—In ſhort, both brothers agree in this, that the ſum to be received by the brother who is not the acknowledger (namely, fifty *dirms*) appertains equally between them:—it is to be conſidered, however, that if the acknowledger were to take the half from his brother upon his receiving payment of theſe fifty, he would then take it from the debtor; and the debtor, again, would take the ſame from the acknowledger; which revolution would be totally uſeleſs: and this is the true meaning of the *Der*, or revolution, as mentioned in the *Hedâya*.

HEDÂYA.

BOOK XXVI.

Of SOOLH, or COMPOSITION.

Definition of the term.

SOOLH, in the language of the LAW, ſignifies a contract by means of which contention is prevented or ſet aſide.—The eſſentials (or *pillars*) of it are declaration and acceptance; and the conditions of it, that the ſubject of the compoſition (that is, the thing with relation to which the contract is formed) be *property*; and alſo, that it be defined, provided there be a neceſſity for ſeizin, but not otherwiſe.—Thus if a perſon claim ſome degree of right in a houſe belonging to another,—and that other claim ſome degree of right in a ſhop belonging to this perſon, and they come to a compromiſe, by relinquiſhing their reſpective rights in favour of each other, ſuch compromiſe or compoſition is valid, although they ſhould not have explained the extent of their rights; ſince ignorance with reſpect to a claim which is to be annulled is not a cauſe of contention.

Chap. I. Introductory.
Chap. II. Of *gratuitous* or *voluntary* Compoſitions; and of the appointment of *Agents* for Compoſitions.
Chap. III. Of Compoſitions of Debt.

CHAP. I.

Compoſition may be made in three modes—*with acknowledgement,*—*under ſilence,*—and *after denial.*

COMPOSITION is of three kinds or deſcriptions.—I. *Compoſition with* ACKNOWLEDGMENT; (as where the defendant acknowledges the right of the plaintiff, and then compounds it for ſome other thing:) II. *Compoſition under* SILENCE; (as where the defendant neither acknowledges nor denies the claim:)—and, III. *Compoſition after* DENIAL.—All theſe deſcriptions of compoſition are lawful; becauſe GOD ſays, in the *Koran*, "COMPOSITION IS LAUDABLE;" and this ordinance being *abſolute*, neceſſarily includes all theſe ſpecies of it;—and alſo, becauſe the *prophet* has ſaid "*every compoſition is lawful* "*amongſt* MUSSULMANS, *excepting ſuch as renders lawful what is* "*unlawful, or renders unlawful what is lawful.*"—*Shafeï* maintains that compoſitions *after denial* or *under ſilence* are unlawful, becauſe of the above tradition; for in theſe two caſes it neceſſarily follows that what is unlawful becomes lawful, and what is lawful becomes unlawful,—ſince the thing given in compoſition was, previous to the concluſion of the contract, unlawful to the giver, and lawful to the receiver; but afterwards becomes the reverſe. Beſides, in both theſe caſes, the defendant gives property for the removal of contention; and this is *bribery*.—The arguments of our doctors, in ſupport of their opinion upon this point, are threefold. First, the text of the *Koran*, as above quoted.—Secondly, the *firſt* part of the above tradition concerning the prophet, comprehends *both* the caſes in queſtion; whereas the *latter* part applies ſolely to a compoſition which renders lawful ſomething in itſelf originally unlawful, such as *wine*;—or, which renders unlawful ſomething that in itſelf was originally lawful; as where a man agrees with a wife, for a certain conſideration, not to have carnal connexion with another of his wives.—Thirdly, compoſition after *denial*, or under *ſilence*, is a compoſition in conſequence of a *valid claim*, and is therefore effectual, ſince the *claimant* receives the thing given in compoſition in lieu of a right of his own, which in his opinion was a juſt one; and this is lawful; and the *defendant*, on the other hand, pays it to remove from himſelf a contention;—and this alſo is lawful; becauſe the object of property is ſelf-preſervation; and the giving of a bribe, with a view to remove oppreſſion from himſelf, is lawful in the giver. Beſides, this cannot be ſtrictly termed a *bribe*, as a bribe is what is taken by the receiver for the reaſon aſſigned by the giver, whereas here it is otherwiſe, for the giver gives it in order to prevent contention, and the receiver takes it becauſe in his opinion it is his juſt right.

Compoſition, by a conceſſion of property for property, is equivalent to ſale:

In a compoſition made after acknowledgment, all the effects of *ſale* take place, provided it be a compoſition of *property for property*; becauſe it then correſponds, in its nature, with *ſale*, which is an exchange of property for property by mutual conſent of the parties;—whence it is that, if it relate to land, it admits of the right of *Shaffa*; and alſo, that the conſideration may be returned on account of a *defect*; and that the conditions of *inſpection* and of *option* exiſt with reſpect to it.—This ſpecies of compoſition, therefore, is rendered invalid by an ignorance of the *conſideration* for the compoſition, as ſuch ignorance

and is rendered invalid by an igno-

ignorance may be a cauſe of contention, whereas an ignorance of the ſubject of the compoſition cannot afford any cauſe of contention, as that merely ceaſes, (in conſequence of the compoſition,) whence there is no occaſion for taking poſſeſſion of it.—It is, moreover, a condition, that the defendant be competent to make good the amount of the conſideration in queſtion.—If, however, the compoſition be a ſtipulation of uſufruct in lieu of property, then the laws and rules incident to *hire* take place with regard to it; becauſe the characteriſtic of *hire* (namely, an endowment with *uſufruct* in exchange for *property*) exiſts in it;—and as, in contracts, regard is had to the *ſpirit* of the agreement, it is alſo requiſite that the period of right to the uſufruct be fixed.—The compoſition is alſo rendered null by the deceaſe of any of the parties during that term *, becauſe a compoſition of this nature is a ſpecies of *hire* †.

rance of the thing to be given in compoſition.

Compoſition by a conceſſion of *uſufruct* is equivalent to *hire*;

but the term of uſufruct muſt be ſpecified.

COMPOSITIONS ſubſequent to *denial* are, with reſpect to the *defendant*, equivalent to an atonement for an oath ‡,—and ſubſequent to *ſilence*, they ſtand (with reſpect to him) merely as a *removal of ſtrife*;—but they do not ſtand as a *mutual exchange*, with reſpect to him, in either caſe.—With reſpect to the *plaintiff*, on the contrary, they are in the nature of a *mutual exchange*; becauſe the plaintiff accepts the compoſition in lieu of an article which in his belief was his right; and one contract may lawfully bear different interpretations with regard to the two parties, in the ſame manner as the diſſolution of a ſale is an annulment of the contract with reſpect to the *ſeller* and *purchaſer*, but with reſpect to others, a *new ſale*. The reaſon of a

Compoſitions after *denial* are equivalent to an *exchange* with reſpect to the *plaintiff*, but not with reſpect to the *defendant*.

---

* That is, during the term of *uſufruct*.

† A contract of *hire* is rendered null by the demiſe of either of the contracting parties during its term.

‡ Suppoſing him (as *defendant*) to have ſworn to the fallacy of the plaintiff's claim; in which caſe, if he afterwards enter into a compoſition with the plaintiff, it is evident that he ſwore falſely, and conſequently, that atonement or expiation is due for his perjury.

compoſition after *denial* ſtanding, with reſpect to the defendant, as an *atonement for an oath* is obvious;—and it ſtands after *ſilence* as a mere *removal of ſtrife*, becauſe ſilence admits of two ſuppoſitions, namely, *acknowledgment* or *denial*; and hence, with reſpect to the compoſition in queſtion being a *contract of exchange*, there is a *doubt*; and, in conſequence of this doubt, it cannot be eſtabliſhed as an *exchange* with reſpect to the *defendant*.

The conceſſion of a houſe, by a compoſition, does not induce a right of *Shaffa*:

If a perſon claim a houſe from another, and that other either deny the claim, or remain ſilent, but afterwards compound the matter with the claimant for a certain amount, in that caſe the right of *Shaffa* does not operate with reſpect to that houſe; becauſe the defendant receives it as his *original right*, and not in virtue of *exchange*; ſince he gives the amount of the compoſition to the plaintiff merely to put an end to the contention.

Objection.—Although the defendant, in his own belief, receive the houſe as his original right, and pay the compoſition to put an end to the contention, yet the plaintiff believes that he receives the compoſition *in lieu* of the houſe, and therefore (on the grounds of the belief of the plaintiff) the right of *Shafa* ought to operate.

but *Shaffa* is induced by the act of *giving* a houſe in compoſition.

Reply.—The belief of the *plaintiff* has no effect upon the *defendant*, ſince a man is judged by *his own* belief, and not by that of *others*.—It is otherwiſe where a houſe is *given* in compoſition; (as where, for inſtance, a perſon claims ſome property from another, and that other, after denying the right, or remaining ſilent, compounds the claim by giving up a *houſe*;) for in this caſe the right of *Shafa* takes place, as the plaintiff receives the houſe in exchange for his property, and the compoſition is therefore, with reſpect to *him*, a *contract of exchange*,—(for which reaſon the right of *Shafa* operates *upon his own acknowledgment*, notwithſtanding the defendant contradict him.)—It is therefore the ſame as if he were to declare that "he "has *purchaſed* the houſe from the defendant,"—and the defendant deny the ſame; in which caſe the right of *Shaffa* operates; and ſo alſo in the caſe in queſtion.

Caſes in which part of the thing given in compoſition muſt be reſtored.

IF a perſon claim ſomething from another, and that other, having acknowledged the claim, compound it with the plaintiff for ſomething elſe; and it afterwards appear that the thing claimed was in part the property of another,—in that caſe the defendant is entitled to take back from the plaintiff a part of the thing given in compoſition, proportionate to that part of the article claimed, which afterwards proved the property of another; becauſe the compoſition in this caſe is, like ſale, a contract of exchange with reſpect to both parties; and ſuch is the law in *ſale*, when a part of a thing ſold proves the property of another.

If the compoſition be after *denial* or *ſilence*, and the thing compounded for prove the right of another, the conſideration muſt be returned, and the plaintiff muſt lay his claim againſt him who has the right;

IF a perſon claim a thing from another, and that other either deny it or remain ſilent, and then compound with the plaintiff for ſome other article, and it afterwards appear that the thing claimed is the right of another and not of the plaintiff, in that caſe the plaintiff muſt prefer his demand againſt the perſon who claims the right, and return to the defendant whatever he may have received from him in compoſition; becauſe the defendant gave his property merely for the purpoſe of removing contention; but when, afterwards, it appears that the thing claimed is the property of another, it becomes evident that he was not liable to a contention with the plaintiff. Hence he is entitled to take back the article given in compoſition, as the condition on which he gave it (namely, a right to detain in his poſſeſſion the ſubject of the claim) is rendered void.—If, on the other hand, a *part*, only, of the thing claimed prove the right of another, the plaintiff muſt in that caſe return to the defendant a proportionate part of the thing given in compoſition, and make a demand for the ſame upon the perſon poſſeſſing the right; becauſe the intent of the defendant does not comprehend that proportion.

and the ſame, proportionably, where any *part* of it proves the property of another.

If the thing given in compoſition after acknowledgment, prove the right of another, it muſt be reſtored, and the plaintiff is entitled to an equivalent from the defendant.

If the thing given in compoſition prove the right of another, the plaintiff is in that caſe entitled to receive from the defendant the whole amount of the compoſition, provided it be after *acknowledgment*, as this ſpecies of compoſition is equivalent to *ſale*, (as was before explained.)—If, alſo, the right of another appear to *a part* of the compoſition, the plaintiff is entitled to a proportionate part of it, for the ſame reaſon.

If this happen in compoſition after *ſilence* or *denial*, the plaintiff muſt claim, from the defendant, the article in diſpute.

If, in a caſe of compoſition after *ſilence* or *denial*, it appear that the whole or a part of the thing given in compoſition is the property of another, the plaintiff muſt prefer a claim againſt the defendant for the thing in diſpute between them, either *wholly*, or in *part*, as the caſe may be.—It is otherwiſe in a caſe of *ſale* after denial; as where, for inſtance, a perſon lays claim to a houſe, and the perſon upon whom the claim is made denies his right, but afterwards compounds the matter by means of a ſlave, uſing, however, the word "*ſold*" inſtead of "*compounded*;" as if he ſhould ſay "I have "*ſold* this ſlave for the ſaid houſe;" for, in that caſe, if the houſe afterwards prove to be the property of another, the plaintiff, inſtead of claiming, is entitled actually to take the houſe from the defendant; becauſe the defendant, in *ſelling* the ſlave for the houſe, does virtually acknowledge the houſe to be the property of the plaintiff:—contrary to a caſe of *compoſition*, as compoſitions are frequently made merely to remove contention.—It is to be obſerved that, in caſe the thing given in compoſition be either loſt or deſtroyed in the hands of the defendant, previous to the delivery of it, the law is the ſame as where it proves the right of another:—that is, if the compoſition follow *acknowledgment*, the plaintiff is entitled to take the article claimed;—or, if it follow *denial* or *ſilence*, he muſt prefer a claim for it againſt the defendant.

A compoſition for an *undefined part*

If a perſon claim a right in a houſe, without explaining the extent of it, (ſuch as a *third*, a *fourth*, or the like,) and the defendant, under

Digitized by Google

under this ſtate of uncertainty, give him ſomething in compoſition for his claim, and the right of another afterwards appear to a *part* of the houſe, the plaintiff is not in that caſe obliged to return to the defendant any part of the thing received in compoſition, ſince it is poſſible that the right may relate to ſome *other* part of the houſe, and not to that part which the plaintiff had claimed. It is different where the *whole* of the houſe proves to be the property of another; for in that caſe the whole of the thing given in compoſition muſt be returned to the defendant; ſince it would otherwiſe neceſſarily follow that the defendant had received nothing in exchange for the thing he gave in compoſition; and this is unlawful; as has been already explained under the head of *ſale*.

of a thing is not affected by the right of another afterwards appearing to a *part* of that thing.

If a perſon claim a houſe, and the defendant compound the claim for *a part* of the houſe, ſuch compoſition is unlawful, becauſe what the plaintiff receives is already his actual right, and the reſt of his claim remains unſatisfied. There are two devices, however, by which this compoſition may be rendered lawful.—The one is, by the plaintiff adding a *dirm* to the ſhare of the houſe; in which caſe, the *dirm* is conſidered as an equivalent for the remaining part of the claim:—the ſecond is, by the plaintiff exempting the defendant from the remaining part of the claim.

Compoſition in conſideration of a part of the ſubject is invalid.

SECTION.

Compositions are lawful in claims of *property*; for a compoſition (as was before explained) being in the nature of a *ſale*, it follows that whatever may be lawfully *ſold* may alſo be lawfully *compounded*.—Compoſitions are likewiſe lawful in claims of *uſufruct*; as for inſtance, where

Diſputes concerning *property* may be compounded;

and alſo, claims of *uſufruct*.

where a perſon prefers a claim, againſt the heirs of a perſon deceaſed, to the uſufruct of, or right to dwell in, a particular houſe, in virtue of the bequeſt of the deceaſed; in which caſe, if the heirs, having either denied or acknowledged the claim, ſhould compound it with the plaintiff for ſomething elſe, ſuch compoſition is valid.—The reaſon of this is that uſufruct is conſidered as a *property*, in a contract of *hire*, and ſo alſo in a caſe of *compoſition*;—for it is a general rule, to conſider the compoſition as partaking of the nature of that contract to which it bears the neareſt reſemblance, in order to render it valid.—Thus, if the compoſition be of *property for property*, it is conſidered as a *ſale*, becauſe of its near reſemblance to that contract.—If, on the other hand, it relate to *uſufruct*, it is conſidered as a ſpecies of *hire*, becauſe of its reſemblance to it.

Compoſitions are lawful in *homicide*:

COMPOSITIONS are lawful in caſes either of *wilful* or *erroneous* bloodſhed.—They are lawful in the *former* inſtance, becauſe GOD has ſaid "IF A PORTION OF THE PROPERTY OF THE MURDERER, BEING A BELIEVER, BE OFFERED, BY WAY OF COMPOSITION, TO THE REPRESENTATIVE OF THE MURDERER, LET HIM ACCEPT THE SAME;"—which paſſage *Ibn Abbas* reports to have been revealed upon the ſubject of compoſitions for wilful bloodſhed.—It is to be obſerved that compoſition for *wilful bloodſhed* reſembles *marriage*, becauſe in both caſes property is given without receiving property in return; and accordingly, whatever is capable of conſtituting a ſpecific dower, is alſo capable of being given in compoſition for wilful bloodſhed.—There is this difference, however, between marriage and the compoſition in queſtion, that whenever the recital of the thing to be given in compoſition is invalid, (as where an *animal* is mentioned indefinitely, or cloths are recited without a ſpecification of them,) a *Deyit* or fine of blood muſt be paid;—becauſe ſuch is the rule in caſes of bloodſhed; and an invalidity in the nomination does not prevent the remiſſion of retaliation, in the ſame manner as it does not prevent the validity of marriage.—If, however, a compoſition of *wine* or *pork* be ſtipulated for wilful bloodſhed, nothing whatever is due; becauſe neither

but if acceded to for an unlawful article, nothing is due.

Digitized by Google

neither of theſe articles are valuable property: it is therefore underſtood that the avenger of blood, in agreeing to receive a compoſition which is not property, has, in effect, remitted the retaliation; and as, in a remiſſion of the retaliation, no property is due, ſo neither is it in the caſe in queſtion.—In *marriage*, on the contrary, a *Mihr-Miſl* (or *proper* dower) is due in either caſe, (that is, in caſe of the invalidity of the recital,—or, where the dower is ſtipulated to be paid in wine or pork;) becauſe the dower is one of the eſſential requiſites of marriage, and is therefore due in LAW, although no recital ſhould have been made of it. It is to be obſerved that as the crime expreſſed in this caſe of compoſition is *abſolute*, it relates both to the *members* of the body, and to the *body itſelf*, that is to ſay, the *life*.—It is alſo proper to obſerve that, although compoſitions for wilful bloodſhed be lawful, as above related, yet it is otherwiſe with reſpect to compoſitions of property for the right of *Shafa*, (by a perſon receiving property from a purchaſer, in compoſition for his right of *Shafa*,) which is invalid, becauſe the proprietor of the right of *Shafa* has no abſolute property from it, but merely a right to become proprietor if he pleaſe: until, therefore, he become the proprietor, he has no right to compound for it.—*Retaliation*, on the other hand, means a right of property in the ſubject, with reſpect to the *action*: in other words, the heir or repreſentative is proprietor of the ſubject ſo far as relates to the action, in as much as he has a right to take retaliation, and may conſequently, if he chooſe, receive a compoſition for not taking of it: in oppoſition to the caſe of *Shafa*.—Now, ſince a compoſition of property for the right of *Shafa* is invalid, it follows that nothing is on that account due from the purchaſer, and that the right of *Shafa* is loſt, in the ſame manner as in a caſe of *non-oppoſition* or *ſilence*.—Bail for the perſon is alſo like the right of *Shafa*, and therefore nothing is due in caſe of a compoſition of property for it.—With reſpect, however, to the annulment of the bail, in ſuch a caſe, there are two traditions, both of which have been already recited in their proper places.—Compoſitions are alſo lawful in the *latter* caſe (namely, *erroneous*

roneous bloodſhed,) becauſe they in this inſtance relate to *property*; and therefore reſemble *ſales*. Still, however, they are not lawful when they exceed the amount of the fine of blood; becauſe the rate of that, as having been fixed by the LAW, cannot be ſet aſide: any thing, therefore, beyond the fine of blood, muſt be rejected.—It is otherwiſe in *retaliation*, for there the compoſition may exceed the *fine of blood*, as retaliation is not *property*, and therefore cannot be converted into it but by a ſpecial contract.—What is here advanced proceeds upon the ſuppoſition that the compoſition conſiſts of one of the three ſpecies of *Deyits*, namely *dirms*, *deenars*, or *camels*.—If, however, it conſiſt of any other ſpecies of property, it is lawful, becauſe it is in that caſe an exchange for the *Deyit*, or *ordained fine*. But yet it is requiſite that the delivery be made upon the ſpot where the contract is concluded, becauſe it muſt otherwiſe follow that one debt (namely, the *Deyit*) remains oppoſed to another debt (namely, the *compoſition*,) which is declared, in the ſacred writings, to be illegal.—If the *Kâzee* ſhould paſs a decree directing the murderer to pay the *Deyit* in one of the three modes to the avenger of blood; and he [the murderer] enter into a compoſition with him [the avenger] for another ſpecies of property, in a degree exceeding the *Deyit*, ſuch compoſition is lawful, provided it be from hand to hand; becauſe, after the decree of the *Kâzee*, the right of the avenger of blood to the amount decreed by the *Kâzee* becomes fixed and determined; and his compoſition of it, in that caſe, is merely an *exchange*.—It is different where the parties themſelves, in the *beginning*, enter into a compoſition for one of the three kinds, exceeding the amount of the *Deyit*; becauſe the conſent of the parties to one of the three kinds is equivalent to the decree of the *Kâzee* in reſpect of fixing it;—(that is, in the ſame manner as it is fixed by the decree of the *Kâzee*, ſo alſo is it fixed by their conſent;) and as the *Kâzee* is not empowered to paſs a decree exceeding the amount of the *Deyit*, ſo neither are they permitted to fix it at a ſuperior rate. Hence it is not lawful to exceed the rate of a thing already fixed by the ſacred writings.

There is no compoſition for *puniſhment*,

COMPOSITION for claim of *Hidd*, or ſtated puniſhment, is not lawful.—Thus if a perſon ſhould apprehend another in the act of whoredom, or of ſtealing the goods of another, or of drinking wine, or whilſt in a ſtate of intoxication, and, intending to carry the culprit before the *Kâzee*, ſhould notwithſtanding accept ſomething for ſuffering him to eſcape, ſuch compoſition is invalid; becauſe *puniſhment* is a right of GOD, and it is not lawful to accept a compoſition for the right of *another*.—For the ſame reaſon, alſo, it is not lawful to compound with a woman for a claim of parentage. For inſtance, a divorced woman, having brought forth a child, ſays to the divorcer "this is your child," and he denies the ſame, but compounds with the woman for withdrawing her claim; which compoſition is invalid, becauſe the claim of parentage was not *her* right, but that of the *child*; and the acceptance of a conſideration for the right of another is not valid.—In the ſame manner, if a perſon erect a bathing-houſe, or a place for ſitting in, on the high road, and another having required him to pull it down, he compound with him to withdraw his claim, ſuch compoſition is invalid, becauſe, the high road being the right of the community, no individual is ſingly entitled to compound for it.—It is to be obſerved that the *puniſhment* mentioned on this occaſion comprehends *puniſhment for ſlander*, becauſe in ſuch puniſhment the right of GOD is predominant.

claim of parentage,

or, for ſufferance of a building on the highway.

A claim of *marriage* may be compounded,—whether the claim proceed from a *man*,

IF a perſon claim marriage with a woman, and ſhe deny the ſame, but compound with the man for his claim, the compoſition in that caſe is valid, becauſe there is a poſſibility of reconciling it to the LAW, by ſuppoſing that the man conceives the contract of compoſition to be in the nature of a *Khoola*; and, on the other hand, that the woman pays the money to remove ſtrife.—Lawyers, however, have aſſerted that, in the ſight of GOD, it is not lawful for the perſon, in this caſe, to take the compoſition, if his claim be unfounded.

or a *woman*.

If a woman claim marriage with a man, it is lawful for him to compound the claim with her. The author of the *Hedáya* remarks, upon this, that although the law be thus ſtated in ſeveral copies of the compendium *, yet in other copies ſuch compoſition is declared to be illegal.—The *legality* of it is eſtabliſhed by ſuppoſing that the thing given in compoſition is an increaſe of her dower; and that he afterwards *ſells* her a divorce for the amount of her original dower†, ſo that the increaſe, or the amount of the compoſition, remains binding upon him.—The reaſon of its *illegality* is, that the man having given ſomething by way of compoſition to the woman, to induce her to retract her claim, it follows that this retractation muſt either be conſidered as equivalent to a ſeparation between them, or as *not* equivalent to a ſeparation: now, if it be equivalent to a ſeparation, it is invalid, becauſe no property is given for a *ſeparation*, ſince it operates of itſelf upon the parties; (as, for inſtance, where a woman admits the ſon of her huſband to carnal connexion, in which caſe the LAW enjoins a ſeparation between them:)—if, however, on the other hand, the retractation from the claim be *not* conſidered as equivalent to a ſeparation, then the caſe remains as before; and the compoſition is conſequently invalid, as not being oppoſed to any advantage in exchange.

A claim of *bondage* may be compounded;

If a perſon claim another as his ſlave, and that other compound with him for his claim, by giving him ſome ſpecific property, ſuch compoſition is valid, as being, with reſpect to the plaintiff, *an emancipation in exchange for property*; becauſe in his belief the defendant gives the compoſition in exchange for his freedom; and is therefore conſidered in the light of a *Mokátib*.—It is for this reaſon, alſo, that the compoſition in queſtion is valid, if made in conſideration of an animal due, and to be delivered at a fixed future period; becauſe it would not be valid if it were conſidered as an *exchange* of property for property inſtead of an *emancipation* for property: for an animal cannot exiſt as a debt in exchange for property, as has been explained in treating of the *Sillim* ſale of animals: but it may exiſt as a debt for ſomething elſe than property, as in the caſe of *marriage* or a *fine of blood.*—It is therefore requiſite that the compoſition in queſtion be conſidered as an *emancipation*, and not as an *exchange.*—With reſpect to the *defendant*, the compoſition, in this caſe, is merely a *removal of contention*, ſince he believes himſelf to be originally free.—It is to be obſerved that in this caſe no right of *Willa* over the defendant reſts with the plaintiff, becauſe of the denial of the former.—If, however, the plaintiff prove by witneſſes that the defendant was his ſlave, ſuch evidence is admitted, and the right of *Willa* then reſts with him.

---

* The *Mookhtaſſir*; a compendium of the commentary of *Kadooree*.

† See *Khoola*.

but it leaves no right of *Willa* in the *claimant*.

If a *Mazoon*, or *privileged* ſlave, wilfully kill a perſon, he is not of himſelf entitled to compound for the murder: but if *his* ſlave ſhould commit murder, he may then lawfully compound for it. The diſtinction between theſe two caſes is that the perſon of a *privileged* ſlave not being a ſubject of *traffic*, he is not entitled to diſpoſe of it in any manner, (ſuch as, for inſtance, to *ſell* himſelf,) and in the ſame manner he is not entitled to *redeem* his perſon by means of the property of his maſter, being conſidered with reſpect to his perſon as a ſtranger. *His* ſlave, on the contrary, is a ſubject of traffic, whence he is at liberty to ſell, or otherwiſe to diſpoſe of him, and conſequently may alſo redeem him. The reaſon of this is that the ſlave, on committing the crime, ceaſes to be his property; whence the compoſition reſembles a *purchaſe* of him; and this it is lawful for a privileged ſlave to make.

A *privileged* ſlave cannot compound for offences committed by *himſelf*; but he may for offences committed by his *ſlave*.

If a perſon uſurp cloth from a *Jew*, of which the value was leſs than a hundred *dirms*, and, having loſt or deſtroyed the ſame, compound the matter with the *Jew* by agreeing to pay him a hundred *dirms*

Caſe of compoſition for a property uſurped; and which pe-

riſhes in the uſurper's hands.

dirms previous to any judicial decree upon the ſubject, in that caſe the compoſition is lawful, according to *Haneefa.* The two diſciples maintain that the compoſition, in this caſe, is not lawful in the degree in which it exceeds the appraiſed value of the cloth; becauſe nothing was due from the uſurper but the *value*; and the value of any article is to be known only by appraiſement; any thing beyond *that* muſt therefore be conſidered as uſury.—It is otherwiſe, however, if the compoſition for the cloth be made in articles of *furniture*, or ſo forth, exceeding in value the article uſurped; for ſuch compoſition is valid, becauſe the difference of the value not being *obvious*, from the articles being of a different genus, no uſury can be inferred. It is otherwiſe, alſo, if the difference of value be ſuch as may come within the eſtimation of *ſome* of the appraiſers, becauſe the obſervance of an *exceſſive degree* of caution is impracticable. The reaſoning of *Haneefa*, in ſupport of his opinion, is that the right of the proprietor of an uſurped article continues in it after its deſtruction, until his right to an equivalent be eſtabliſhed; as is evident from this circumſtance, that if an uſurped ſlave ſhould die, and the maſter refuſe to accept an equivalent, he muſt in that caſe defray the expences of his burial. Now from this it appears either that the right of the proprietor of an uſurped article remains in it after its deſtruction,—or, that he has a right, if he chuſe, to a ſimilar, both in *appearance* and in *reality* *, becauſe reparation for a tranſgreſſion muſt be made in a *ſimilar*.—But his right is not transferred to the *value* until ſuch time as the *Kázee* paſs a decree to that effect: any agreement, therefore, exceeding the value, which the parties themſelves may conclude previous to ſuch decree, being merely a *compenſation* for the article deſtroyed, or for one ſimilar to it in *appearance* and *reality*, cannot be conſidered as uſurious.—It is otherwiſe if ſuch agreement be made *after* the decree of the *Kázee*; for, in that caſe, according to all our doctors, the compoſition is not valid, as far as it exceeds the value; becauſe, in this inſtance, the right of the proprietor to the value has become fixed and determined by the decree of the *Kâzee*; and any thing beyond it is therefore uſurious.

---

* Independant of any judicial decree.

Caſe of compoſition for a ſhare in a *partnerſhip ſlave.*

If a man who is *rich* emancipate a ſlave held equally in partnerſhip between himſelf and another, and compound with that other for a ſum exceeding the value of his half, ſuch compoſition is invalid, according to all our doctors:—according to the two diſciples, becauſe (as they hold) nothing is due from the emancipator beyond *half the value*, which is to be aſcertained by appraiſement; whence any degree beyond that is uſurious:—and, according to *Haneefa*, becauſe the *value*, in emancipation, is decreed by the LAW; now the rate fixed by the LAW is not ſhort of the rate fixed by the *Kâzee*; and as, in a caſe where the *Kâzee* paſſes a decree for the value, a compoſition for any thing *beyond* the value is null, it is in the preſent inſtance null *a fortiori*.—It is otherwiſe in the example concerning the cloth, as before recited, becauſe the *value* of that is not decreed by the LAW.—It is to be obſerved that if, in the caſe in queſtion, a compoſition exceeding the value of half the ſlave be made in *ſpecific* goods or effects, it is valid, becauſe the exceſs in the value is not *obvious*, where the articles are of a different genus; and hence no uſury can be inferred.

CHAP.

CHAP. II.

Of *gratuitous* or *voluntary* Compoſitions; and of the Appointment of *Agents* for Compoſition.

An agent for compoſition in a caſe of *bloodſhed* or *debt* is not reſponſible for the conſideration, unleſs he expreſsly agree to be ſo:

If a perſon appoint another his agent for compoſition, and the agent accordingly enter into a compoſition on his behalf, he [the agent] is not reſponſible for the thing to be given in compoſition, unleſs, in ſettling the contract, he ſtipulate it as a condition that "he himſelf "ſhall be anſwerable for it."—This is where the compoſition is on account of *wilful bloodſhed*, or of ſome claim in the nature of debt, in either of which caſes the compoſition is a mere *annulment*; and as the agent, in either caſe, is merely a *meſſenger*, he is therefore ſubject to no reſponſibility, any more than an agent for marriage;—unleſs he himſelf engage in the reſponſibility,—in which caſe he becomes anſwerable, becauſe of his *contract of ſecurity*, but not from his *contract of compoſition*.—Where, however, the compoſition is *of property for property*, it is equivalent to a *ſale*, and the rights of it appertain to the agent.—In ſuch a caſe, therefore, the claim for the property (that is, for the article to be given in compoſition) lies againſt the *agent*, not againſt the *conſtituent*.

but he is reſponſible where the compoſition is of *property for property*.

Fazoolee compoſitions are of four deſcriptions:

Fazoolee compoſitions (that is, ſuch as are concluded by a *ſtranger*, in behalf of the defendant, without his deſire) are of four kinds.

I. Of a debt by property; (for which

I. Where a perſon compounds for a claim of debt by property, and makes himſelf reſponſible for the property:—in which caſe the compoſition is complete, becauſe the defendant acquires nothing from it, but is merely exempted from a debt, and in this reſpect a ſtranger and the party that is the defendant are conſidered as the ſame.—It is alſo proper to remark further, that in the ſame manner as the condition of reſponſibility for the thing to be given in compoſition is lawful to the *defendant*, ſo alſo is it lawful to the *ſtranger*: a ſtranger, therefore, is capable of ſtanding as the *principal* in compoſition, and in the obligation of the property, when he makes himſelf reſponſible for the thing to be given in compoſition; in the ſame manner as a *Fazoolee* who concludes a *Khoola* in behalf of a wife.—In other words, if a perſon propoſe a *Khoola* to his wife, and another, without the deſire of the wife, conclude the *contract* of *Khoola* with the huſband on her behalf, making himſelf reſponſible for the conſideration of *Khoola*, it is valid, and he is reſponſible for the conſideration;—and ſo alſo in the caſe in queſtion, the *Fazoolee* is reſponſible for the thing to be given in compoſition.—He, moreover, ſtands, with reſpect to the defendant, as one who acts *gratuitouſly*, in the ſame manner as a perſon who voluntarily pays the debts of another, in as much as he exempts the defendant from reſponſibility; he therefore is not entitled to any return from the defendant: but it is otherwiſe where the compounder acts by the deſire of the defendant, for in that caſe he is not a *voluntary* agent. The compounder in queſtion, moreover, is not entitled to any part of the debt; but that is cancelled with reſpect to the defendant; for the principle, with reſpect to the legality of the compoſition, in this caſe, is that the plaintiff annuls the operation of the debt upon the defendant, and not that he renders the compounder proprietor of it,—and this, whether the defendant acknowledge the debt, or deny it;—in a caſe of *denial*, evidently, becauſe the defendant does not in his own opinion owe any thing, and the opinion or belief of the plaintiff cannot operate upon him;—and in a caſe of *acknowledgment*, alſo, becauſe the property of, or right to the debt, cannot be conveyed to another but by the perſon who is immediately indebted: it is therefore impoſſible, in this inſtance, to render the compoſition valid

the *compounder* is reſponſible:)

valid on any other principle than that of the annulment of the debt.— It is otherwiſe where the plaintiff claims ſome ſpecific article in the poſſeſſion of the defendant, who acknowledges the ſame, and another perſon, unauthoriſed, gives him ſomething as a compoſition for his claim,—becauſe in this caſe the unauthoriſed perſon, in compounding for his claim with the plaintiff, does virtually *purchaſe* the article claimed; and his purchaſe of a thing from the proprietor is lawful, although it be not in his poſſeſſion.

II. Of any thing for a *ſpecific* property; (which muſt be immediately delivered by the compounder.)

II. Where the compounder ſays "I have compounded for *theſe* "thouſand *dirms* of *my own*," or "for *this* ſlave of *my own*;" in which caſe the compoſition is valid; and it is incumbent on the compounder to deliver over the article ſtipulated to the plaintiff; becauſe, in referring the compoſition to *his own* property, he renders obligatory upon himſelf the delivery of it; on which account the compoſition ſo made is valid.

III. Of any thing for *unſpecified* property: (but which the compounder delivers.)

III. Where the compounder ſays "I have compounded for *a* thouſand *dirms*," and immediately delivers a thouſand *dirms* to the plaintiff, in which caſe the compoſition is valid; for on the delivery of the thouſand *dirms* the plaintiff obtains his object, and the contract of compoſition is thereby completely fulfilled.

IV. Of any thing for *unſpecified* property: (and which the compounder does *not* deliver.)

IV. Where the compounder ſays "I have compounded for a thou- "ſand *dirms*," but does not deliver them; in which caſe the compoſition remains ſuſpended on the conſent of the defendant. If he confirm it, he becomes reſponſible for the ſum ſtipulated;—or, if he withhold his aſſent, the compoſition is annulled.—The reaſon of this is that in compoſitions of this nature, the defendant is a principal, becauſe of their operating to free him from contention; but the compounder is alſo a principal, becauſe of his charging himſelf with the conſideration of compoſition, either *expreſsly*, (as where he ſays "I am reſponſible "for the thouſand *dirms*;") or *directly*, (as where he compounds for one

Digitized by Google

one thouſand *dirms*, and delivers them.)—Now, if he ſhould not ſo have charged himſelf, (as the preſent example ſuppoſes,) the contract of compoſition continues on the part of the *defendant* only *; and the validity of it conſequently reſts upon his concurrence.—The compiler of the *Hedáya* remarks that a *fifth* kind of compoſition may be added to the preceding: as, for inſtance, where a *Fazoolee* ſays "I have compounded "for *this* thouſand *dirms*," or "for *this* ſlave," without referring theſe to *his own property*;—which ſort of compoſition is valid, becauſe, in ſpecifying the thing to be delivered to the plaintiff, the compounder does, as it were, eſtabliſh it as a condition that the ſaid thing ſhall become the right of the plaintiff.—If, however, the ſlave ſhould afterwards prove to be the property of another,—or, if it ſhould become known that he was free, or a *Mokâtib* or *Modabbir*,—or, if the plaintiff ſhould return him, on account of a defect, to the compounder, in none of theſe caſes is the plaintiff entitled to take any thing from the compounder, ſince he engaged for nothing further than the delivery of a *ſpecific article*; if, therefore, that article remain ſafe for the plaintiff, the contract is valid; if otherwiſe, he is not entitled to take any thing from the compounder, but muſt prefer his claim againſt the defendant.—It is otherwiſe where the compounder ſtipulates *dirms*, and makes himſelf reſponſible for the ſame, and they afterwards prove the right of another, or of bad quality, and the plaintiff returns them; for in that caſe the plaintiff is entitled to take an equal number of good *dirms* from the compounder, becauſe of his having made himſelf a principal with reſpect to *ſecurity*: and, accordingly, if the compounder refuſe to comply, he muſt be compelled to make the delivery.

Caſe of a *Fazoolee* compounding for a ſpecific article, without referring the ſame to *his property*.

---

* That is to ſay, *he alone* is concerned in it.

CHAP. III.

Of Compoſitions of *Debt*.

A debt owing in conſequence of any contract concluded upon credit may be compounded by payment of a *part*:

If the thing to be given in compoſition be of the ſame nature with the debt which is to be compounded for, and which is owing to the plaintiff under an *Akid Moodâinat*, or *contract concluded upon credit* *, the compoſition is not in that caſe conſtrued to be an *exchange*, but the plaintiff is conſidered as taking a part of his right, and annulling or relinquiſhing the remainder.—An *Akid Moodâinat*, or *contract concluded upon credit*, is where a perſon purchaſes the goods of another, for a thouſand good *dirms*, (for inſtance,) and then the parties ſeparate, without the ſeller receiving the price, or a time of payment being agreed upon:—in which caſe, if the purchaſer ſhould compound the ſaid *thouſand* for *five hundred* good *dirms*, (or for five hundred bad *dirms*,) and the ſeller agree to the ſame, ſuch compoſition is valid; and it is thus conſtrued, that he [the ſeller] agrees to accept a *part* of his right, and to relinquiſh the remainder;—*not* that he accepts the *five hundred* in exchange for the *thouſand*.—The reaſon of this is, that it is neceſſary, as far as poſſible, to give validity to the acts of rational perſons; and this may be done in the former inſtance, by the claimant relinquiſhing a part of the *dirms* to which he is entitled,—or, in the latter

---

[*] The commentators define *Moodâinat* to ſignify "the act of ſelling to a perſon *upon credit*;"—or "the act of *granting credit*."—The compoſers of the *Perſian* verſion of the *Hedâya* have evidently miſtaken the ſenſe of the text in the beginning of this paſſage. The *Arabic* ſimply ſtates it "in all compoſitions for a thing claimed under a *contract upon credit*, "the tranſaction is not conſidered as an *exchange*, but as an acceptance of *a part* of the "right, and a relinquiſhment of the remainder."

latter inſtance, by conceding that and the *goodneſs* of them.—Such alſo is the rule where the debt has been incurred, on the part of the defendant, by a *uſurpation* or *deſtruction* of property.—The *reſtriction* to debts owing " in conſequence of a *contract concluded upon credit*, (as here ſet forth,) is for this reaſon, that it is originally requiſite that debt be incurred in conſequence of a contract agreeable to LAW.—If, in the caſe in queſtion, the compoſition conſiſt of a thouſand *dirms* payable at a *diſtant* time, for a thouſand *dirms immediately* payable, it is valid; becauſe the conſtruction then given to it is that the plaintiff agreed to poſtpone his claim,—*not* that he entered into an *exchange*; as the ſale of *dirms*, for *dirms* payable at a future period, is not lawful.—If, on the other hand, the thouſand *dirms* be compounded for a proportionable number of *deenars*, payable after the expiration of *a month*, (for inſtance,) it is unlawful; becauſe it is impoſſible to conſider it merely as a *delay* of the claim; ſince the claim related to *dirms*, *not* to *deenars*; nor is it poſſible to conſtrue it into a *ſale*, becauſe a ſale of *dirms*, for *deenars* payable at a future period, is unlawful. The compoſition, therefore, in this caſe, is invalid.

and the ſame of ſimilar compoſitions of debt, owing in conſequence of any act which ſubjects to reſponſibility.

Debt may be compounded by a *forbearance*, for the ſame ſum:

but not if the poſtponed payment be ſtipulated in money of a different denomination.

IF a perſon have a debt of one thouſand *dirms*, payable at a future period, owing to him by another in conſequence of a contract upon credit, and compound the ſame for five hundred *dirms* payable *immediately*, ſuch compoſition is invalid; becauſe ready money is better than future payment; and ready money not being his right, the compoſition therefore takes place in a thing which is not his right, whence it is impoſſible to conſider the compoſition as a dereliction of part of the claim:—it muſt therefore be neceſſarily conſidered as an *exchange*; (in this way, that the debtor gives up his right (namely, the delay of payment) in return for the five hundred remitted:)—thoſe five hundred, therefore, are *in exchange* for the forbearance; and the acceptance of any thing in conſideration of *forbearance* is not lawful.

A *poſtponed* debt cannot be compound by the immediate payment of a *part*.

A debt of *bad* money cannot be compounded by the payment of a ſmaller ſum in *good* money;

If a perſon have a debt owing to him by another, in conſequence of a contract upon credit, of a thouſand adulterated *dirms*, and compound it for five hundred pure *dirms*, it is not valid; becauſe pure *dirms* are not the right of the ſeller, as thoſe exceed his right with reſpect to their *quality*, and it accordingly cannot be conſidered as a *conceſſion*: it muſt therefore be conſtrued into an exchange of *one thouſand* for *five hundred*, ſuperior with reſpect to quality,—and that is uſurious, as *quality* is not regarded in tranſactions of *exchange*.—It is otherwiſe where a perſon compounds a debt of a thouſand good *dirms* for five hundred bad *dirms*, becauſe that is a *conceſſion* with reſpect both to *number* and *quality*. It is otherwiſe, alſo, where a perſon compounds a debt due to him of a thouſand bad *dirms* for a thouſand good ones; becauſe this is an exchange of *like* for *like*; and in that no regard is paid to *quality*.—It is, however, a condition, in this caſe, that the plaintiff take poſſeſſion of the thing given in compoſition upon the ſpot, as this is a *Sirf* ſale.

but a debt of *good* money may be compounded by *bad*, whether the ſum be *ſmaller* than, or *equal* to, the demand.

A debt in money of two denominations may be compounded by a ſmaller ſum of either denomination.

If a perſon have a debt of a thouſand *dirms* and a hundred *deenars* owing to him by another, in conſequence of a contract upon credit, and compound the ſame for a hundred *dirms*, ready money, or payable at the expiration of a *month*, (for inſtance,) ſuch compoſition is lawful, as it is poſſible, in this inſtance, to give validity to the contract of compoſition, by ſuppoſing that the creditor remits the whole of the debt owing to him except one hundred *dirms*, payable immediately, or (as in the *ſecond* caſe) within a *month*. It therefore is not to be regarded in the light of an *exchange*: for if it were ſo conſidered, the contract would not be valid, as it would be uſurious. In *compoſitions*, moreover, a conceſſion is always underſtood; and as, in the caſe in queſtion, *conceſſion* is the prevalent idea, the matter muſt be regarded as a *conceſſion* rather than as an *exchange*.

Caſe of propoſal from a

If a perſon, having a debt due to him, of a thouſand *dirms*, payable creditor to grant his debtor a complete diſcharge, on condition of his paying one half of the debt within a limited time;

able at a future period, ſhould ſay to the debtor "pay me five "hundred *dirms* to-morrow, upon this [condition,] that you are ex-"empted from the remainder of the debt;" and the debtor act accordingly, he is then exempted from the remainder. If, however, in ſuch caſe, the debtor ſhould not pay the five hundred *dirms* on the morrow, he remains reſponſible, according to *Haneefa* and *Mohammed*, for the thouſand *dirms*. *Aboo Yooſaf* maintains that five hundred *dirms* are immediately remitted, and that the claim to them cannot afterwards be revived: for (in his opinion) the exemption here is abſolute *; becauſe the plaintiff has eſtabliſhed the payment of five hundred *dirms* as an exchange for the exemption of five hundred *dirms*: but the payment of theſe five hundred *dirms* cannot be conſidered as an exchange for the remainder, the payment of which ſtill continues incumbent upon the debtor, and is not at all ſuſpended upon the exemption. To make it an *exchange*, therefore, is nugatory;—conſequently there remains only the abſolute exemption; and hence the whole of the original debt cannot revive from a failure of the payment on the morrow, any more than if the creditor had ſaid "I have ex-"empted you from five hundred *dirms* out of one thouſand *dirms* "upon this [condition] that you pay me, to-morrow, five hundred "*dirms*;" in which caſe the exemption is abſolute, and ſo alſo in the caſe in queſtion.—The reaſoning of *Haneefa* and *Mohammed* is that the exemption, in this caſe, is not *abſolute*, but *conditional*. Upon failure of the condition, therefore, the exemption does not take place; for two reaſons. FIRST, becauſe the creditor begins his ſpeech with requiring the payment *to-morrow*, and this may be conſidered in itſelf as an object, ſince it is poſſible that the creditor is afraid of loſing the whole of the money in the event of the debtor's becoming poor, which induces him to uſe expedition; and alſo, becauſe he perhaps wiſhes to get the money, in order that he may acquire profit from it in trade. The expreſſion, moreover, bears the conſtruction of being *conditional*, and is therefore to be taken in that ſenſe, in order to give validity to the contract.—Secondly, ſuch conditions are common in compoſitions; and an exemption may be *reſtricted* to a condition, although it be not *ſuſpended* upon it. Thus a *transfer of debt* (for inſtance) is reſtricted to the condition of *ſafety*; in ſo much that if the perſon who had agreed to accept the transfer * ſhould die inſolvent, the debt reverts upon the perſon transferring it; the transfer, therefore, is *reſtricted*, in this inſtance, [to the condition of ſafety;] and ſo alſo in the caſe in queſtion. With reſpect to the reaſoning of *Aboo Yooſaf*, an anſwer will ſoon be given to it.—The compiler of the *Hedáya* remarks that this caſe admits of three ſeparate ſtatements.—I. That which has been already explained.—II. Where the creditor ſays "I have compounded with you the thouſand *dirms* for five "hundred *dirms*; which you muſt pay me to-morrow, and then you "ſhall be exempted from the remainder; provided, however, that "if you do not pay them to-morrow, the thouſand *dirms* ſhall re-"main due by you as before;"—in which caſe, according to all our doctors, if the payment be made on the next day, the exemption holds good; but if otherwiſe, it is void.—III. Where the creditor ſays "I have exempted you from the payment of five hundred *dirms* out "of a thouſand, on this [condition] that you give me five hundred "*dirms* to-morrow:"—in which caſe the debtor is exempted from the payment of the five hundred *dirms*; and this, whether he pay the five hundred on the enſuing day or not, becauſe the exemption is here primarily ſtated †.

---

* That is, it is not ſuſpended upon the condition of payment on the morrow.

which admits of *three* different ſtatements.

I. Where the propoſal has no condition annexed, in failure of payment:

II. Where it is annexed that, in failure of payment the propoſal ſhall be void.

III. Where the diſcharge is primarily ſtated.

---

* That is, *to take upon him the reſponſibility for the debt*, (in the manner of an acceptor or indorſer of a bill of exchange.)

† Two other ſtatements, together with a long diſcuſſion, are omitted by the tranſlator, as the whole turns upon certain points of verbal criticiſm, not capable of an intelligible tranſlation.

In

IF a perſon ſay to another "I will not acknowledge your right of "property until you firſt fix a diſtant time for the delivery, and promiſe "me an indulgence in the payment,"—or "until you firſt remit to "me the *whole* (or a part) of the property,"—and the perſon ſo addreſſed act accordingly, his thus fixing a time, or remitting a part or the whole of the property, is lawful, becauſe he does this of his own accord, and not by *compulſion.*—This is where the acknowledger addreſſes the other party, as above, *ſecretly* and in a *covert* manner.—Where, however, he addreſſes him *publicly*, he becomes liable for the whole of the ſubject of acknowledgment upon the inſtant.

An acknowledgment may be ſtipulated for a compoſition;

but if the ſtipulation be *publicly* propoſed, the compoſition is of no effect.

SECTION.

Of PARTICIPATED DEBTS.

IF there be a debt owing to two men, jointly, from a *third*, and one of the two compound with the debtor his ſhare of the debt for a piece of cloth, the fellow-creditor has it in his choice either to demand the other half of the debt, which is his due, from the debtor, or to take the half of the cloth from the compounder; unleſs, however, he [the compounder] pay him a quarter of the whole debt; for, in that caſe, he is not entitled to take the half of the cloth.—In ſhort, in all caſes of the nature here exemplified, it is a rule that whenever, in a partnerſhip debt, one of the partners receives a part of it, the other partner is entitled to an equal ſhare in the part ſo ſeized; becauſe although debt become a ſort of *increaſe* from ſeizin, (ſince debt is not conſidered as ſubſtantial property until it be taken poſſeſſion of,) ſtill this increaſe has reference to the original right; and as the original right was equally divided, ſo alſo is the increaſe; in the ſame manner

One of two partners compounding his ſhare of a debt due to them jointly, the other partner may either take his proportion of the compoſition, or look to the debtor for his ſhare.

manner as *offspring* or *fruit*. The partner, therefore, has a right of participation in the part which is taken poſſeſſion of.—Still, however, previous to the operation of ſuch right, the part or thing taken is the ſole property of the *receiver*, becauſe *ſubſtance* is totally different from *debt*, and the receiver has taken the article in queſtion *in exchange for his right*.—He is conſequently the proprietor: and accordingly all acts of his with regard to the ſubſtance in queſtion are valid, and he remains reſponſible, in a proportionate degree, to his partner.—It is to be obſerved that by a *partnerſhip* debt is meant ſuch a debt as becomes due to two or more perſons from one cauſe; ſuch as the price of goods ſold by *two* proprietors under *one contract*; or a *debt* inherited by two men; or the value of a joint property deſtroyed by any perſon. Now ſuch being the eſtabliſhed rule, it follows that, in the caſe in queſtion, the partner is at liberty either to demand his half of the debt from the debtor, (ſince his ſhare ſtill remains due to him, in as much as the other partner has only received the amount of his own right,) or to take the half of the cloth from the other partner, becauſe of his right of participation in it.—If, however, the other ſhould give him a compenſation, by paying him the quarter of the debt, he then has no right to half of the cloth, as his *right* is only to a *quarter* of the whole debt.

One of two partners receiving payment of his ſhare in a debt due to them jointly, and paying the other his proportion of what is ſo recovered, has ſtill a claim upon the remainder.
If the other prefer receiving pay-

If one of two partners in a debt ſhould receive, from the debtor, the half of his portion of the debt, the other partner is then at liberty either to participate in the half ſo received, or to look to the debtor for his full ſhare, for the reaſons recited in the preceding example.—If, therefore, he ſhould participate with the compounding partner, both partners are in that caſe entitled jointly to take from the debtor what remains due, becauſe having ſhared equally in what was received, they are of conſequence entitled to ſhare equally in the remainder.—If, on the contrary, he ſhould prefer demanding his ſhare in full from the debtor, to an equal participation in the part received by the other creditor, and that part of the debt which has been received ſhould remain ſafe, and that which remains due be loſt, or deſtroyed, either by the debtor's dying inſolvent, or by his denial of the debt upon oath, he is in that caſe ſtill entitled to a participation with the other creditor in what has been received; becauſe he declined it before only on the ſuppoſition of the *ſafety* of the remaining part of the debt; and when the event proves otherwiſe, he of courſe becomes entitled to an equal participation. Suppoſing, however, that one of the joint creditors, inſtead of receiving his ſhare of the debt, ſhould commute it for a debt which he had previouſly contracted to the debtor,—then the other ſharer, in caſe of the deſtruction of that portion of debt due to himſelf, is not entitled to any participation with him, ſince he is in this inſtance held to have *paid* a debt, not to have *received* payment of one.—The law is alſo the ſame, where one of the creditors *exempts* the debtor from that ſhare of the debt which is due to him, becauſe an exemption is a *deſtruction* and *annulment*, and not a *receipt*.

ment of his part, ſolely, from the debtor, and the property be loſt, or the debtor prove inſolvent, he has then a claim to his proportion of what has been received by this partner; but not where this partner has compounded for his ſhare by a *commutation*.

IF one of two partners in a debt releaſe the debtor from a *part* of his proportion of the debt, (ſuch as an *half*, for inſtance,) the remaining part of the debt is, in that caſe, due to the two creditors in degrees proportionate to their reſpective rights.—As, for inſtance, if the debt due to them were originally twenty *dirms*, and one of them afterwards releaſe the debtor from the *half* of his ſhare, the remaining debt will then be fifteen *dirms*, of which *five* are due to the *exempting* partner, and *ten* to the *other* partner.

In a releaſe from a part of his ſhare, by one partner, the right of the creditors continues in proportion to their remaining claims.

IF one of two partners ſhould protract the period of payment of his ſhare, it is valid, according to *Aboo Yooſaf*, becauſe of its analogy to an abſolute *exemption* or *releaſe*:—in other words, as a ſuſpenſion of the payment is equivalent to a *reſtricted* releaſe, it is therefore valid, in the ſame manner as an *abſolute* releaſe.—According to *Haneefa* and *Mohammed* this is not valid; as in ſuch a caſe it muſt follow that a diviſion of debt takes place prior to ſeizin,—ſince protracting the period of payment with reſpect to *one* ſhare, and not to the *other*, is, as it were,

One of two partners may agree to a poſtponement of payment.

Digitized by Google

a *partition* of the ſhares; and a *partition* of debt previous to ſeizin is not lawful; becauſe partition bears the ſenſe of *endowment with a right of property*, and the endowment with a right in a debt, made to any other than the *debtor himſelf*, is not lawful.—Moreover, partition implies diſtinction; and as diſtinction cannot exiſt with reſpect to any obligation upon the perſon, it is therefore invalid.

One of two partners receives his ſhare by uſurping any thing from the debtor; or, by loſing or deſtroying any thing belonging to him; or, by accepting a leaſe in compoſition; or, by burning a piece of *cloth*, his property.

If one of two partners uſurp ſome ſpecific article from the debtor, or purchaſe ſomething from him by an invalid contract, and loſe or deſtroy the ſame, theſe acts are conſidered as equivalent to a receipt of his debt.—So alſo, if one of two partners accept a *leaſe* from the debtor in lieu of his debt, he is in that caſe held to have received his debt. If, alſo, one out of two partners ſhould *burn* a piece of cloth belonging to the debtor of equal value with his ſhare of the debt, this is a receipt, according to *Mohammed*, but not according to *Aboo Yooſaf*. (Some, however, obſerve that this difference proceeds on the ſuppoſition of his having *thrown fire* on the cloth, without having previouſly *laid hold* of it; for if he ſhould have firſt laid hold of the cloth, and then burned it, all our doctors are of opinion that he has received his ſhare, becauſe he is conſidered firſt to have *uſurped* the cloth, and then to have *deſtroyed* it.)

One of two partners *annuls* his ſhare by *marrying* the debtor (being a *female*) and ſettling his ſhare of the debt as her *dower*; or, by *compounding* with it for an offence.

If the debtor be a female, and one of two partners in the debt ſhould marry her, and ſtipulate his ſhare of the debt as her dower, this, according to the *Záhir Rawáyet*, is an annulment:—and ſo alſo, if he compound, with his ſhare, for a wilful offence.—It is, however, to be obſerved, that if one of the partners in a debt ſhould marry the woman who is their debtor, without ſtipulating his ſhare of the debt as her dower, in that caſe the other ſharer has a claim upon him, as under ſuch circumſtances he is held to have made a commutation with his wife of *his* claim for *hers*. It is otherwiſe where he ſtipulates his ſhare of the debt as her dower; for then he is held to have *annulled*, and not to have *commuted* his right, and on this account the

Digitized by Google

the other ſharer can have no future claim upon him.—It is an invariable rule that, where a receipt has been made, by one partner, the other partner, in caſe of the deſtruction of his right, by the debtor's dying inſolvent, or otherwiſe, is entitled to participate with the receiving partner:—but he has not ſuch right in the caſe of an *annulment.*

One of the partners compounding his ſhare of the debt by a *purchaſe,* the other may either take his ſhare from the debtor, or an equivalent for his proportion in the receipt from the *purchaſer.*

IF one of two partners in a debt *purchaſe* ſomething from the debtor (ſuch as *cloth*, for inſtance) in lieu of his ſhare of the debt, then the other partner is at liberty, either to require his ſhare of the debt from the *debtor*, (in which caſe all the effects take place, as deſcribed in the preceding example, where the partner requires payment from the debtor,)—or, to take an equivalent from the purchaſer of a fourth part of the debt;—becauſe he [the purchaſer] has taken complete poſſeſſion of his debt, ſince in buying and ſelling there is no degree of loſs or diſparity admitted in the things exchanged.—He therefore is reſponſible for a fourth part of the debt, and has no option of either giving a quarter of the debt, or a half of the cloth.—It is otherwiſe in a compoſition, becauſe, as compoſition generally proceeds upon a principle of *lenity* and *abatement*, it would be an injury to the compounder to force him to give a fourth part of the debt, and therefore an option is afforded him either to give a fourth part of the debt, or the half of the article received in compoſition.—The non-receiving partner, moreover, is not entitled to any part of the cloth purchaſed, as the *purchaſing* partner has become proprietor of the ſame in virtue of a contract of *ſale.*

OBJECTION.—The cloth in queſtion ought to be divided between the two partners, as it has been acquired in exchange for a joint debt.

REPLY.—The cloth in queſtion has not been acquired in exchange for a joint debt, but merely in exchange for the ſhare of the *purchaſer*, in this way, that it produces a commutation of the price of the cloth for that part of the debt which is due to *him.*

Objection.—If the price of the cloth be a commutation of his ſhare of the debt, it induces a partition of the debt prior to the ſeizin of it, which is unlawful.

Reply.—A *wilful* partition of debt, previous to the ſeizin, is ununlawful, but an *unintentional* partition of it (by that being *comprehended*, for inſtance) is lawful; and, in the caſe in queſtion, it *is* comprehended in the validity of the ſale; in the ſame manner as (in the *preceding* caſe) the partition of the debt, previous to the ſeizin, is interwoven with the validity of the compoſition.

One of two partners in a *Sillim* contract cannot compound for his ſhare.

If two perſons conclude a *Sillim* contract, (that is, advance money for goods, to be delivered at a future period,) and one of them afterwards compound his ſhare of the goods for his ſhare of the ſtock advanced, it is not lawful, according to *Haneefa* and *Mohammed*.—*Aboo Yooſaf* maintains that it is lawful, as he conſiders this to be analogous to any other debt; and alſo to a caſe where two perſons purchaſe a ſlave, and one of them afterwards diſſolves the contract with reſpect to his ſhare, which is lawful; and ſo alſo in the preſent caſe.—The arguments of *Haneefa* and *Mohammed*, upon this point, are twofold.—First, if the compoſition in queſtion be lawful with reſpect only to the ſhare of *one* of the partners, it muſt neceſſarily follow that a partition of the debt has been made prior to the ſeizin of it; which is unlawful; for as the debt, prior to the ſeizin, is not *extant*, it is impoſſible to diſcriminate part from part. If, on the other hand, it be lawful with reſpect to the ſhares of *both*, then the conſent of the other muſt be had.—It is otherwiſe where two perſons purchaſe a ſlave, and one of them diſſolves the contract with reſpect to his ſhare, becauſe the ſlave in queſtion is extant, and the partition of an *extant* thing is not impracticable, ſince part can be diſcriminated from part, whether *before* ſeizin or *after* it.—Secondly, if the compoſition in queſtion be valid, it muſt follow that the right of the purchaſer to the goods for which the advance has been made is annulled, and eſtabliſhed in the capital, (that is, in the *price advanced*,) and that it afterwards reverts with reſpect to the goods for which the advance has been made. For ſuppoſing the compoſition to be valid, and that one of the partners receives, in conſequence, his ſhare of the capital, the other partner has then a right to take from him his proportion of it; and the compounder again has a claim upon the other partner for a proportionate part of the goods. Hence it follows that the right of the compounder reverts, with reſpect to the goods for which the advance has been made, after annulment:—but an annulment cannot take place without a *diſſolution:* a diſſolution, therefore, is primarily eſtabliſhed.—Now, upon his right reverting, an annulment of the diſſolution is induced; and this is unlawful, as a diſſolution in contracts of *Sillim* cannot be annulled.—Lawyers have obſerved that this caſe proceeds on a ſuppoſition of the purchaſers having mixed together their capital: for, if their ſhares of the capital ſhould not have been mixed or complicated, then (according to the firſt of the above arguments) the ſame diſagreement muſt ſtill ſubſiſt; ſince a diviſion of the debt previous to the ſeizin muſt then alſo neceſſarily follow: but, according to the ſecond argument, the compoſition is valid in the opinion of all our doctors; for, in ſuch a caſe, the non-compounding partner would not participate with the compounder in that part of the capital which he receives back, as they were not copartners in the capital, and hence it does not follow that the right of the purchaſer, to the goods for which the advance was made, reverts after annulment.—It is recited in the *Auzih* that this aſſertion concerning the unanimity of our doctors, as ſtated in the ſecond argument, is not well founded; becauſe a right to participate in the article received is founded on this circumſtance, that the goods for which the advance has been made conſtitute a joint debt, as it ariſes from one contract in which they are alike concerned; and hence the non-compounding ſharer has a right to participate with the compounder in whatever he may have received in virtue of their partnerſhip in the goods for which the advance was made, whether their ſhares of the capital have been complicated or not.

SECTION.

Of TAKHÂRIJ.

Definition of the term.

TAKHÂRIJ, in the language of the LAW, ſignifies a compoſition entered into by ſome heirs with other heirs, for their ſhare of the inheritance, in conſideration of ſome ſpecific thing, which excludes them from inheritance.

Heirs may compound with a co-heir for his ſhare of inheritance, conſiſting of *land* or *effects*, by any equivalent;

IF the eſtate of a perſon, conſiſting of land, or of goods and effects, be liable to be ſhared among ſeveral heirs; and the heirs compound with one amongſt themſelves for his ſhare of the inheritance, by giving him ſome ſpecific article, ſuch compoſition is lawful, whether the thing given be ſuperior or inferior to his right; becauſe it is poſſible to legalize this compoſition, by conſtruing it in the nature of a *ſale*; and alſo, becauſe it is related that, in the time of *Oſman*, *Tamázir*, the wife of *Abdul-Rihmân*, the ſon of *Auf*, who had been divorced by her huſband in his laſt illneſs, compounded her ſhare of the inheritance, which was a *fourth* of the eighth, for one *half* of the fourth of an eighth; as is evident from this circumſtance, that *Abdul-Rihmân*, who, beſides children, had four wives, left an eſtate of *five millions three hundred and twelve thouſand* DEENARS; and the ſhare ſhe received was eighty three thouſand *deenars*, which is *one half of the fourth of an eighth.*

or, by *one* precious metal, where the inheritance is in *another* precious metal.

IN the ſame manner alſo, if the eſtate conſiſt of ſilver, and gold be given to one of the heirs as a compoſition,—or, if it conſiſt of gold, and a compoſition be given in ſilver, it is valid, whether the thing given be inferior or ſuperior, becauſe this is a ſale of one ſpecies for another, and in it the condition of equality between the conſideration and the return is not required.—It is requiſite, however, that the ſubjects of the compoſition be mutually interchanged and taken poſſeſſion of by the parties at the place where the contract of compoſition is concluded; for this is a *Sirf ſale*, and in it mutual ſeizin at the meeting is a neceſſary condition.—But if the heir, in whoſe poſſeſſion the remainder of the eſtate is, ſhould deny the poſſeſſion, then the *former* ſeizin ſuffices, becauſe it is a ſeizin of reſponſibility, (ſince it is in the nature of uſurpation,) and may therefore ſtand for a ſeizin of *compoſition*.—If, on the contrary, he ſhould *acknowledge* the poſſeſſion, then it is neceſſary that a new ſeizin be made; becauſe the ſeizin, in that caſe, being in the nature of a *truſt*, and conſequently unattended with reſponſibility, is weak in compariſon with a ſeizin of *compoſition*, which is attended with reſponſibility, and therefore cannot be ſubſtituted in the place of it.

An inheritance of *bullion* and *effects* may be compounded for by *gold* or *ſilver*; but this gold or ſilver muſt exceed the ſhare of the ſame metal inherited; and the heir muſt be put in poſſeſſion of ſuch exceſs at the time of adjuſting the compoſition.

IF the eſtate conſiſt of *gold*, *ſilver*, *goods*, and *effects*, and the heirs compound the ſhare of one amongſt themſelves for *ſilver* or for *gold*; it is in that caſe requiſite that the gold or ſilver given in compoſition be ſomewhat greater than his ſhare of the gold or ſilver by inheritance, in order that, after oppoſing an exact equality of the two ſimilar ſpecies to each other, there may remain ſome exceſs to oppoſe as a compoſition for his ſhare of the other articles, to the end that the imputation of uſury may be avoided.—In this caſe, alſo, it is requiſite that poſſeſſion be taken, *at the meeting*, of the thing oppoſed to his ſhare of the gold or the ſilver, becauſe the compoſition to that extent is conſidered in the nature of a *Sirf* ſale.—If, in the caſe in queſtion, the compoſition be made for *goods* and *effects*, it is lawful, *abſolutely*,—that is, whether ſeizin be made by the parties at the meeting, or otherwiſe,—and whether the thing given in compoſition be *inferior* or *ſuperior* to the ſhare of the inheritance.

An inheritance of *money* may be compounded for by *money*; each ſpecies being oppoſed to the other reſpectively.

If the eſtate conſiſt of *dirms* and *deenars*, and the compoſition alſo conſiſt of *dirms* and *deenars*, it is lawful, whether the amount given in compoſition exceed or fall ſhort of the ſhare of inheritance compounded for, becauſe each kind is oppoſed to its oppoſite, in the ſame manner as in *ſale*.—It is a requiſite, however, that the ſeizin be made at the meeting, becauſe the compoſition in queſtion is in the nature of a *Sirf* ſale.

The inheritance of a *debt* cannot be compounded,

If there be a debt due to the deceaſed, and it be included in the compoſition,—by the compounding heir giving up his ſhare of it, and agreeing that it ſhall go entirely to the other heirs, ſuch compoſition is null;—becauſe in this caſe the heir renders the other heirs proprietors of his ſhare of a *debt*, which is unlawful, as the property of a debt cannot be conveyed to any but the perſon indebted.—The compoſition, therefore, is null;—becauſe it is null in that part which relates to the debt; and when a contract is null in *part*, it becomes null in the *whole*;—ſince where a contract is invalid with reſpect to a *part* of its ſubject, it is invalid *in toto*.—If, however, the compoſition be made on this condition, that the compounding heir ſhall releaſe the debtor from his ſhare of the debt, and that the others ſhall not exact it, the compoſition is valid, as it is either an *annulment* of the debt, or a conveyance of it to the debtor.—This is one expedient for legalizing the compoſition.—Another expedient is, by the heirs paying, in a *gratuitous* manner, to the compounding heir, the ſhare of the debt which is due to him, and then making a compoſition with him for his ſhare of the collected part of the eſtate.—In both theſe expedients, indeed, an injury reſults to the other heirs:—in the *latter*, evidently, as there they pay his demand, out of their right, without any return;—and in the *former*, becauſe it is poſſible that they may never receive the debt, nor any part of it, from the poverty of the debtor. The beſt expedient, therefore, is that the heirs *lend* the compounding heir the amount of his ſhare of the debt, and then compound with him for his

except by the heir agreeing to releaſe the debtor from his proportion;

or by the other heirs paying him that proportion *gratuitouſly*;

or *lending* it to him, to transfer to the debtor.

Digitized by Google

his ſhare of the collected eſtate; and that he then transfer the ſaid loan to the debtor, in order that the other heirs may lawfully receive from the debtor the ſhare of the debt which is due to him.

Caſe of compoſition of an inheritance, where the particulars of the eſtate are not known.

If there be no debts due to the eſtate of the deceaſed, and it be not known of what ſpecies the articles of the eſtate conſiſt, and one of the heirs compound his ſhare for articles of weight, or meaſurement of capacity,—ſome have ſaid that this compoſition is not lawful, becauſe of the ſemblance it bears to uſury.—Others, however, maintain that it is lawful, as the ſemblance to uſury is dubious in this inſtance; for, in the firſt place, it is poſſible that the articles may conſiſt of articles of weight and of meaſurement of capacity, and it is alſo poſſible that they may *not*;—and, in the next place, if they do conſiſt of ſuch articles, it is poſſible that the quantity of the compoſition may be unequal to his right, and it is alſo poſſible that it may be equal to it.—The ſemblance to uſury is therefore dubious; and regard is had to an *actual* ſemblance only, not to a *dubious* ſemblance.

Caſe of the ſame, where the particulars are only known in *part*.

If the eſtate conſiſt of ſomething elſe than articles of weight or meaſurement of capacity, but of which the particular ſubſtances are unknown, and one of the heirs compound his ſhare for articles of weight or meaſurement of capacity,—ſome have ſaid that this is unlawful; becauſe the compoſition, in this caſe, is in the nature of a *ſale*, or an *exchange of property for property*; and this is not lawful when one of the articles oppoſed in exchange is uncertain. The moſt approved opinion, however, is, that it is lawful; ſince the uncertainty here cannot be productive of ſtrife, inaſmuch as the thing for which the compoſition is made, and which is the ſubject of the uncertainty, is in the hands of the reſt of the heirs.

The inheritance of an *inſolvent* eſtate can

If the eſtate be completely overwhelmed with debt, neither compoſition nor diviſion of it amonſt the heirs is lawful; becauſe the heirs are not, in this caſe, maſters of the property, as inheritance

Digitized by Google

neither be compounded for nor diſtributed.

heritance takes place only with reſpect to ſuch property as is unincumbered with ſome eſſential requiſite of the deceaſed; and the payment of the debts of the deceaſed is one of his eſſential requiſites. If, alſo, the eſtate be *not* completely overwhelmed with debt, it is not even then becoming to enter into any compoſition until the debts be diſcharged. Lawyers, however, have ſaid that if, in ſuch caſe, a compoſition or a diviſion be made, prior to a diſcharge of the debts, it is valid.—*Koorokhee*, in treating of partition, obſerves that it is not valid according to a favourable conſtruction of the law; but that it is valid upon the principle of analogy.

HEDÂYA.

BOOK XXVII.

Of Mozâribat, or Copartnerſhip, in the Profits of Stock and Labour.

Definition of the term.

MOZÂRIBAT is derived from *Zirrib*, and means, in its literal ſenſe, *to walk on the ground.* In the language of the LAW, *Mozâribat* ſignifies a contract of copartnerſhip, of which the one party (namely, the proprietor) is entitled to a profit on account of the *ſtock*, he being denominated *Rabbi Mâl*, or proprietor of the ſtock, (which is termed *Râs Mâl*;) and the other party is entitled to a profit on account of his labour; and this laſt is denominated the *Mozârib* (or manager,) inaſmuch as he derives a benefit from his own labour and endeavours. —A contract of *Mozâribat*, therefore, cannot be eſtabliſhed without a participation

A participation in the profit is an

Digitized by Google

eſſential of the contract. participation in the *profit*; for if the whole of the profit be ſtipulated to the *proprietor of the ſtock*, then it is conſidered as a *Bazât*; or, if the whole be ſtipulated to the immediate *manager*, it be conſidered as a loan.

Chap. I. Introductory.
Chap. II. Of a Manager entering into a Contract of *Mozâribat* with another.
Chap. III. Of the Diſmiſſion of a Manager; and of the Diviſion of the Property.
Chap. IV. Of ſuch Acts as may be lawfully performed by a Manager.
Chap. V. Of Diſputes between the Proprietor of the Stock and the Manager.

CHAP. I.

Contracts of *Mozâribat* are lawful. CONTRACTS of *Mozâribat* are authorized by the LAW from neceſſity; ſince many people have property who are unſkilled in the art of employing it; and others, again, poſſeſs that ſkill without having the property:—hence there is a neceſſity for authorizing theſe contracts, in order that the intereſts of the rich and poor, and of the ſkilful and unſkilful, may be reconciled:—moreover, people entered into ſuch contracts in the preſence of the prophet, who did not prohibit, but confirmed the ſame: ſeveral of the companions, alſo, entered into theſe contracts.

WHATEVER

Digitized by Google

The ſtock is a *truſt* in the manager's hands.

WHATEVER may be given by the proprietor of the ſtock to the manager is conſidered as a *truſt*, becauſe the manager takes poſſeſſion of the ſame *at the deſire of the proprietor*, and neither with a view to purchaſe nor to pawn.—The manager is alſo an agent on the part of the proprietor in regard to the employment of the ſtock, as he acts in that reſpect by the orders of the proprietor. Whenever, therefore, any profit is acquired, the proprietor and the manager are joint ſharers in it, inaſmuch as it proceeds jointly from the *ſtock* of the *one*, and the *labour* of the *other*.

If the contract be of an invalid nature, the manager, in lieu of profit, receives an adequate *hire*.

WHEN a contract of *Mozâribat* is invalid, it is, in effect, an *invalid hire*; becauſe, as the manager acts for the proprietor, with regard to his ſtock, the profit which is ſtipulated to him is ſimilar to *hire* for his *labour*. The contract of *Mozâribat*, therefore, where it is invalid, bears the conſtruction of an *invalid hire*; and ſuch being the caſe, the manager is entitled only to a hire adequate to his labour *.

A manager, oppoſing the proprietor, ſtands as an *uſurper*.

IF the manager ſhould oppoſe the proprietor, he is then held to be an *uſurper*, ſince he wilfully tranſgreſſes with reſpect to the property of another.

A *Mozâribat* holds only in ſuch ſtock as admits of partnerſhip.

CONTRACTS of *Mozâribat* are valid only with reſpect to ſtock in which contracts of copartnerſhip are valid; namely, *dirms* and *decnars*, (according to *Haneefa*,) and alſo *current Faloos*, (according to the two diſciples,) as has been already treated of at large, under the head of *Partnerſhip*.—Hence if a proprietor of ſtock ſhould give goods or effects to another, and deſire him "to ſell them, and then to act "as a *Mozârib* with regard to the price †," the contract of *Mozâribat* would in ſuch caſe be lawful, becauſe it is not referred to the *goods* or *effects*, but to the *price* of theſe, and this is a thing reſpecting which a contract of *Mozâribat* is valid.—In regard to his referring the contract to a price at *a future period*, it is lawful to do ſo in contracts of *Mozâribat*; becauſe ſuch contracts are either in the nature of a *commiſſion of agency*, or of *hire*; and neither of theſe is preventive of the validity of a reference to a future period.—In the ſame manner, alſo, if the proprietor ſhould ſay, "receive the debt due to me by a particular perſon, and act as manager with regard to it;" the contract of *Mozâribat* is then lawful, becauſe, by being referred to the period of ſeizin, it relates to *ſubſtance* and not to *debt*, and it is lawful to refer it to a future period, for the reaſon above mentioned.—It is otherwiſe, however, where the proprietor of the ſtock ſays, "act as a *Mozârib* with reſpect to the debt *due by you*;" for this is not lawful either according to *Haneefa* or the two diſciples:—according to the *former*, becauſe he holds an appointment of agency of this nature to be unlawful, (as has been before explained in treating of *agency* and *ſale:*) and alſo according to the two diſciples, becauſe, although ſuch an appointment of agency (as they hold) be lawful, yet as a thing purchaſed by a perſon ſo inſtructed is the property of the *inſtructor*, it follows that the contract of *Mozâribat* relates to *goods* and *effects* *, and is accordingly unlawful.

---

* To underſtand this it may be proper to remark, that where a contract of hire is rendered invalid by the invalidity of any of its *conditions*, the perſon hired is entitled only to a hire proportionable to the ſubject, and not to the hire ſtipulated in the contract.

† That is, "*to employ them in trade, in the manner of* MOZARIBAT."

It requires that the profit be *determinate*.

It is one of the conditions of a contract of *Mozâribat*, that the profit of the proprietor and the manager be indeterminate; that is to ſay, that neither of them be entitled to a ſpecific number of *dirms*: for if the condition of a ſpecific number of *dirms* be ſtipulated with reſpect to one or other of the parties, the partnerſhip between them with reſpect to the profit ceaſes to exiſt, ſince it is poſſible that the whole profit might not exceed the number fixed, and it is eſſential that they be *partners* in the profit. If, therefore, ten *dirms*

---

* Arab. *Rakht woo Mattâa*, as diſtinguiſhed from *Mâl*. See Vol. I. p. 28.

6 (for

(for inſtance) be fixed as the portion of one of the parties, the manager is entitled to an hire adequate to his labour, becauſe the contract of *Mozâribat* has become invalid, ſince it is poſſible that the whole profit acquired may not exceed the amount fixed, in which caſe there could be no *copartnerſhip* with reſpect to it.—The manager is, in this caſe, entitled to an *adequate hire*, becauſe his object in his labour was to receive *a return*, and he is prevented from receiving ſuch return by the invalidity of the contract: it is therefore indiſpenſable that he be paid an adequate *hire*.—In regard to the profit which in ſuch caſe may be acquired, it goes to the proprietor, being conſidered as the offspring of *his property*.—This is the law in every caſe of an invalid contract of *Mozâribat*.—It is to be obſerved that an adequate hire, in the caſe of an invalid contract of *Mozâribat*, cannot, in the opinion of *Aboo Yooſaf*, exceed the quantity ſtipulated. According to *Mohammed*, on the contrary, whatever may be adequate, without any regard to the quantity ſtipulated, muſt be given; as has been already explained in treating of *partnerſhip*.—In a caſe where the contract proves invalid, an adequate hire is declared, in the *Rawâyet Aſſil**, to be due, although no profit ſhould have been acquired, becauſe the hire of a hireling is due upon the delivery either of *profit* or of *labour*, and the delivery of *one* or *both* of theſe here takes place.—It is recorded from *Aboo Yooſaf* that nothing in ſuch caſe is due, becauſe of its analogous reſemblance to a *valid* contract of *Mozâribat*;—that is to ſay, as in a valid contract of *Mozâribat* nothing is due to the manager in the event of there being no profit, ſo, if the contract be invalid, nothing is due to him *a fortiori*.—It is further to be obſerved that the ſtock of an invalid contract of *Mozâribat* is not to be replaced or accounted for in caſe of its loſs or deſtruction;—that is to ſay, indemnification is not incumbent upon the manager;—becauſe, as there is no reſponſibility for a loſs of ſtock in a *valid* contract, ſo neither is there any in an *invalid* contract; and alſo, becauſe, as the manager in the caſe of an invalid contract is only a *hireling*, and the ſtock remains in his poſſeſſion merely that he may employ it, no indemnification is due from him on account of its deſtruction.

---

* The *original traditions*. A law-book ſo called.

and not ſubjected to any *uncertainty*:

Another requiſite, in contracts of *Mozâribat*, is that there be no condition creative of an uncertainty with reſpect to the profit; for ſuch a condition invalidates the contract, from its deſtruction of the object of it. Any other invalid conditions, however, excepting this, or ſuch as are oppoſite to the nature of the contract, do not invalidate the contract, but of themſelves fall to the ground, as in the caſe of a condition of loſs to the manager, (where it is ſtipulated that "whatever profit may accrue ſhall be ſhared between the proprietor and the manager, according to their agreement; but that if any loſs reſult, it ſhall fall entirely on the manager.") The contract of *Mozâribat*, therefore, is not annulled by the ſtipulation of conditions of this nature, but the condition itſelf is null; becauſe, as the condition is merely *redundant*, and is neither productive of a diſſolution of the partnerſhip, nor of uncertainty with reſpect to the profit, the contract of *Mozaribat* is not thereby rendered invalid; in the ſame manner as agency does not become invalid from the invalidity of its conditions.

that the ſtock be completely made over to the manager:

Another requiſite in *Mozâribat*, is that the proprietor deliver over the ſtock to the manager, and retain no ſeizin of it, becauſe it is in the manager's hands in the nature of a *depoſit*, and muſt therefore be in his ſole poſſeſſion, and in no reſpect in poſſeſſion of the proprietor. It is otherwiſe in a contract of *partnerſhip*; becauſe, in a contract of *Mozâribat*, the property is ſupplied by the *one* party, and the labour by the *other*; whence it is indiſpenſable that the property remain entirely with the manager, in order that he may be competent to perform the neceſſary labour with regard to it; whereas, in partnerſhip, the labour is ſupplied by *both* parties; whence, if it were ſtipulated that the property ſhall remain entirely with one of the parties, a contract of partnerſhip would not be eſtabliſhed.

A condition of management by the proprietor of the ſtock invalidates the contract;

A condition of management by the proprietor of the ſtock invalidates a contract of *Mozâribat*; becauſe, where ſuch a condition exiſts, the ſtock can never be poſſeſſed ſolely by the manager, wherefore he cannot be competent to act with reſpect to it, and thus the object of the contract (namely, a participation in the profit) cannot be effected;—and this, whether the proprietor be of ſound underſtanding or otherwiſe, (ſuch as an infant,) becauſe, as the poſſeſſion of the ſtock is eſtabliſhed in the proprietor in virtue of his right of property, ſo long as it continues in his poſſeſſion no delivery of it to the manager can be certified.—In the ſame manner, alſo, if one of two *Mozâribat* partners, or one of two *Ainân* partners *, deliver ſtock to any perſon in the way of a *Mozâribat*, and ſtipulate that the other partner ſhall alſo engage in the management of it, ſuch contract of *Mozâribat* is null,—becauſe the other partner is alſo a proprietor of the ſtock in queſtion, although he be not a party to the *Mozâribat* agreement.

and ſo alſo, a condition of management by the contracting party, although he be *not* the proprietor,

If the *contractor* of a *Mozâribat* agreement be not the proprietor of the ſtock, and ſtipulate that he alſo ſhall unite with the *Mozârib*, or manager, in the management of the ſtock, ſuch agreement or contract is invalid, where the contractor happens to be incompetent, —that is, where he is a perſon who (like a *priviledged ſlave*) cannot lawfully undertake the management of ſtock, in the way of *Mozâribat*. —Where, therefore, a priviledged ſlave gives ſtock to another to manage in the way of *Mozâribat*, ſtipulating that he ſhall, conjunctly with the manager, act with regard to the ſtock, for a proportion of the profit, the contract is invalid, becauſe although the ſlave be not actual *proprietor* of the ſtock, yet as he has a poſſeſſion of it, with the power of employment, he is held to be the ſame as the proprietor, and therefore his poſſeſſion of it is deſtructive of the validity of the contract.—But if the party be competent to receive ſtock, and act as a manager, then the contract in queſtion would not be invalid;—as where, for inſtance, a *father*, or a *guardian*, gives the property of his infant charge to any perſon, to manage in the way of *Mozâribat*, ſtipulating that he himſelf, in exchange for a certain ſhare of the profit, ſhall join in the management of the ſtock;—in which caſe the contract is valid; becauſe, ſuch a perſon being himſelf entitled to undertake the management of the infant's property, in the way of *Mozâribat*, is equally entitled to join in the management of it in the way of *Mozâribat*, with others.

---

* See *Partnerſhip*, Vol. II. p. 311.

unleſs he be competent to undertake it.

The manager is at liberty to act with the ſtock according to his own diſcretion,

As contracts of *Mozâribat* are *abſolute*, that is to ſay, are not reſtricted to *time*, *place*, or other circumſtances, it is therefore lawful for the manager to purchaſe or ſell, or to eat of, or travel with, the ſtock: or to lodge it, either as a *Bazât* or a *depoſit*; becauſe the contract is unreſtricted; and the object of it is the acquiſition of profit; and as this cannot be accompliſhed but by *trade*, the contract of courſe extends to every occurrence in commerce; and the appointment of an agent, or the giving property by way of *Bazât*, or the depoſit of property, are all occurrences of commerce;—and in the ſame manner, *travelling* is evidently ſo, becauſe a truſtee, who has no power of action with reſpect to his truſt, has yet a power of travelling with it, and therefore a manager, who has the power of action with regard to the ſtock, is entitled to travel with it *a fortiori*:—beſides, the word *Mozâribat* in itſelf implies this power, as it is derived from *Zirrib*, which ſignifies *to walk on the ground*, or, in other words, *to travel*.—It is recorded from *Aboo Yooſaf* that a manager is not at liberty to travel; and he has alſo related an opinion of *Haneefa*, that if the proprietor ſhould give the ſtock to the manager in his own city, the manager is not in that caſe at liberty to travel, becauſe to travel with property is an unneceſſary endangerment of it; but that, if the proprietor give the ſtock to him in ſome *other* city than his own, he

Digitized by Google

may then travel to his own city, becauſe it is not likely that a man ſhould continue always travelling; and as the proprietor knowingly gave him the ſtock in *another* city than his own, it may be preſumed that he thereby conſented to his travelling with the property to his own city.

but he cannot entruſt it to another in the manner of *Mozâribat* without the proprietor's conſent;

IT is not lawful for a manager to make over the ſtock to another, in the way of *Mozâribat*, unleſs with the conſent of the proprietor, or unleſs he ſhould have empowered him to act according to his own judgment and diſcretion; becauſe a thing cannot include its *like*, ſince both being of equal force, one cannot yield to the other.—Hence it is neceſſary either that an expreſs permiſſion ſhould have been given, or an abſolute and diſcretionary power have been delegated.—This caſe, therefore, is ſimilar to that of the appointment of an agent; for one agent has not the power of appointing another agent, unleſs the conſtituent ſhould have ſaid "act according to "your own judgment and diſcretion."—It is different with reſpect to the *depoſiting* of property, or giving it by way of *Bazât*, becauſe theſe acts are lawful to a manager, as they are of a nature inferior to a contract of *Mozâribat*, and a thing may include its inferior.

nor *lend* it to another, although his powers be diſcretional.

IT is not lawful for a manager to grant a loan to any one out of the *Mozâribat* ſtock, although the proprietor may have ſaid to him "act "according to your own diſcretion;" becauſe the proprietor of the ſtock, in giving this diſcretional power, means to give a latitude with reſpect to ſuch things only as are relative to *trade*; and a loan is not connected with trade, but is a gratuitous deed, in the ſame manner as *charity*, or a *gift*; wherefore, by giving a loan, the *object* (namely, *profit*,) cannot be obtained, ſince to receive back more than what is lent is not lawful.—Giving property in the way of *Mozâribat*, on the other hand, is in the nature of *trade*, and therefore a manager in ſuch a caſe may give the ſtock which is the ſubject of it, by way of *Mozâribat*, to another, provided the proprietor have empowered him to act according to his judgment and diſcretion.—The caſe is the ſame with reſpect to partnerſhip and commixture of the ſtock with the manager's own property;—that is to ſay, if the manager ſhould commix the ſtock with his own property and thus become a partner therein, it is lawful, provided the proprietor have empowered him to act according to his judgment and diſcretion, becauſe mixture and copartnerſhip are in the nature of trade, and the power ſo given is therefore held to extend to it.

The manager cannot deviate from any reſtrictions impoſed upon him in the contract.

If a perſon give property to another by way of *Mozâribat*, and reſtrict his management of it to a particular city or to particular articles, it is not lawful for the manager to deviate therefrom; becauſe this is in the nature of a commiſſion of agency; and as reſtriction is attended with an advantage, it is therefore allowed to operate.—(An explanation will hereafter be given of the nature of reſtriction).—Neither is it lawful for the manager under ſuch circumſtances to give the ſtock by way of *Bazât* to another perſon, to be carried by him from that particular city; for as it is not lawful for the manager himſelf to carry it from that city, he therefore is not entitled to delegate ſuch a power to another.

Upon violating the reſtriction, the manager becomes reſponſible for the ſtock.

If the proprietor reſtrict the management of the ſtock to a particular city, and the manager nevertheleſs carry it to another city, and there purchaſe ſomething with it, he becomes in that caſe reſponſible for the ſtock; and whatever he may have purchaſed with it becomes his property, as well as the profit which may ariſe therefrom; becauſe he ſtands as a *uſurper*, ſince he has aſſumed a power of action with reſpect to the property of another without that other's conſent.—If, however, the manager, having carried the ſtock out of the particular city, ſhould not purchaſe any thing with it until he had returned to the city to which the proprietor had reſtricted his power of action, he becomes freed from reſponſibility, (in the ſame manner as a truſtee who has oppoſed the depoſiter becomes freed from reſponſibility on the ceſſation of ſuch oppoſition,)—and the ſtock reſumes its former nature of *Mozâribat*, in virtue of its continuance in the poſſeſſion of the manager, under the original contract.—In the ſame manner, alſo, if the manager, having bought ſomething with *part* of the ſtock in the city in queſtion, ſhould depart from it with the remaining part of the ſtock, and again return without having purchaſed any thing with it, in that caſe both the purchaſe which was at firſt made, and the part which was afterwards brought back, are conſidered in the nature of *Mozâribat*, for the reaſon above-mentioned.—It is to be obſerved that what has been here related with reſpect to the manager's becoming reſponſible upon carrying the ſtock to another city, and there making a purchaſe with it, is recited from the *Jama Sagheer*.—In the *Mabſoot*, treating of *Mozâribat*, it is related that the manager becomes reſponſible immediately on carrying the ſtock from the preſcribed city.—The more approved doctrine, however, is that the manager becomes reſponſible immediately on carrying away the ſtock from the preſcribed city; and that upon his making a purchaſe with it in another city the reſponſibility becomes fixed and permanent, ſince there then exiſts no probability of his bringing it back to the preſcribed city.—The condition ſtated in the *Jama Sagheer*, therefore, of the manager *making a purchaſe* out of the city, relates to the *confirmation* of the reſponſibility, and not to the *original birth* of it, which takes place immediately on carrying the property out of the city.

A reſtriction to any particular part of a city is invalid,

If a perſon give ſtock to another by way of *Mozâribat*, on condition of his making a purchaſe with the ſaid ſtock in the *market-place* of a particular city, the condition is invalid; becauſe a city, notwithſtanding the diſtinction of its parts, is yet like *one place*, and ſuch a reſtriction is therefore uſeleſs.—If, however, he expreſsly limit the purchaſe to the *market-place*, by ſaying, "purchaſe with this ſtock "in the *market-place*, and no where elſe," a purchaſe made *out* of the market-place is in that caſe unlawful, becauſe the proprietor in this

unleſs ſtipulated under an expreſs exception of any other place.

this inſtance has expreſsly declared that "he *ſhall not* make a purchaſe out of the market-place;"—and the proprietor is authorized to lay this reſtriction.—The *reſtriction* here mentioned is to be underſtood in the proprietor ſaying to the manager, "I give this ſtock to "you on condition that you act with it *in ſuch a manner*,"—("that "you purchaſe *cotton* with it," for example;)—or, on condition that "you employ it *in ſuch a place*;"—and ſo alſo, from his ſaying, "Take this ſtock and employ it in *Koofa*;" or, "Take this ſtock "on condition of half the profit ariſing from it in *Koofa*."—If, however, the proprietor were ſimply to ſay, "Employ this ſtock in "*Koofa*," the manager may then employ it in *Koofa* or out of *Koofa*.—The proofs, upon theſe points, are connected with *Arabick grammar*.

The manager may be reſtricted, in his tranſactions, to *particular perſons*.

If the proprietor ſay to the manager, "Take this ſtock, on condition that you purchaſe and ſell with it with a particular perſon," ſuch reſtriction is valid, being founded on the particular credit in buſineſs of the perſon to whom it relates.—It is otherwiſe where he ſays "Take this ſtock on condition that you purchaſe with it from the "people of *Koofa*," or "ſell it to them;"—or, "Take this ſtock for "a *Sirf*-ſale, on condition that you purchaſe with it from *Sirráſs*, "[bankers] or ſell it to them;"—for if the manager, (in the *former* inſtance,) ſell the ſtock in the city of *Koofa*, to a perſon who is not an inhabitant of that city, or (in the *latter* inſtance) ſell it to ſome one who is not a *Sirráf*, his act is lawful;—becauſe the *firſt* of theſe reſtrictions is merely a reſtriction in point of *place*; for as the people of *Koofa* are all different in regard to their judgments and manner of tranſacting buſineſs, the reſtriction to them *in general* could be attended with no advantage, whereas the reſtriction to the *place* is advantageous in regard to the preſervation of the ſtock: and the *ſecond* of theſe reſtrictions is a reſtriction to *a particular mode* of ſale; for as he did not confine the reſtriction to any one individual, but to a particular ſet of people who proſecute the buſineſs of *Sirrâfs**, it is evident that the reſtriction was meant merely to a *Sirf* ſale.—Such is the meaning, in common acceptation, of the reſtriction in theſe two particular caſes; but not in others.

The contract may be reſtricted, in its operation, to a particular period.

IF the proprietor limit the *Mozâribat* to a particular period, the contract becomes null at the expiration of that period; becauſe, as this is a *commiſſion of agency*, its continuance is therefore reſtricted to the period ſpecified; and as the reſtriction of its duration may be advantageous, it therefore operates in the ſame manner as a reſtriction to a particular *place*, or to a particular *mode of ſale*.

Nothing can be purchaſed, by the manager, which is not a ſubject of property, in virtue of ſeizin, with reſpect to the proprietor.

A MANAGER is not at liberty to purchaſe, with the ſtock, a ſlave, who would become free by being transferred to the proprietor, whether from the circumſtance of *affinity*, or from any other cauſe, (as if the proprietor had already *vowed* to emancipate him,)—becauſe the contract has been made with a view to the *acquiſition of profit*, which can be obtained only by *repeated acts*, ſuch as previous *purchaſe* and ſubſequent *ſale*; and to this laſt the freedom of the ſlave operates as a bar:—and for this reaſon the purchaſe of all ſuch things as do not become *property* in virtue of ſeizin, (ſuch as *wine* or *carrion*), is not comprehended in a *Mozâribat* contract. (It it otherwiſe with reſpect to the purchaſe of a thing under an *invalid ſale*; for this is comprehended in a *Mozâribat* contract, ſince the manager may lawfully ſell that thing again after ſeizin; and conſequently profit, which is the object of the contract, may in that caſe be obtained.)—If, therefore, a manager purchaſe a ſlave who becomes free with reſpect to the proprietor of the ſtock, ſuch purchaſe is not included in the *Mozâribat* ſtock, but is conſidered to have been made for the manager himſelf: for the bargain being valid with reſpect to the purchaſer, is therefore effectual with reſpect to him, in the ſame manner as in the caſe of an agent for purchaſe who oppoſes his conſtituent.

---

* *Sirrâf* is derived from *Sirrif*, which ſignifies a *pure ſale*, or the act of exchanging one ſort of *ſpecie* for another: hence *Sirrâf* means not only a *banker* or *money changer*, but alſo any one whoſe dealings are of that nature; and conſequently a negotiator of *Sirf* ſales.

The manager cannot purchaſe a ſlave, free with reſpect to himſelf, where any profit has been previouſly acquired upon the ſtock.

It is not lawful for a manager to purchaſe a ſlave who is free with reſpect to the manager himſelf, where a profit has been gained upon the ſtock; becauſe the ſhare of the manager (namely, *in the profit*) would in this caſe become emancipated from the *whole ſtock*, and conſequently the ſhare of the proprietor would be vitiated *, according to *Haneefa*. (The two diſciples hold that it would become *emancipated*, becauſe of the known difference of their opinion from that of *Haneefa* concerning the *diviſibility* or *indiviſibility* of *manumiſſion*.)—Now, where a ſlave becomes emancipated, either wholly, or in part, he is no longer a lawful ſubject of ſale; and conſequently the *end* of the contract (namely, the acquiſition of profit,) cannot by this means be obtained. Hence it is not lawful for a manager, where a profit has been gained upon the ſtock, to purchaſe a ſlave who, with reſpect to himſelf, becomes free.—If, however, he ſhould make this purchaſe, under ſuch a circumſtance, he becomes reſponſible for the amount of the *Mozâribat* ſtock ſo expended, becauſe he is then held to have made the purchaſe for himſelf, and he has paid the price out of the ſtock.—But if there have been no acceſſion of profit to the ſtock, the manager may lawfully purchaſe a ſlave that is free with reſpect to himſelf, becauſe there exiſts no bar, in this caſe, ſince the manager has no ſhare in the purchaſe †, ſo as to render his portion in the ſlave free.—And if, after the purchaſe, a profit ſhould ariſe, from the ſlave increaſing in value, the manager's portion of the ſlave, involving his ſhare of the profit, is emancipated; and he is not, in this caſe, in any reſpect reſponſible to the proprietor of the ſtock *, becauſe neither the increaſe of the value, nor the ſhare acquired by the manager, were effected by his means, but operated of themſelves independant of his will or endeavour. Hence this caſe is the ſame as where a perſon becomes heir to a *relation*, or to ſome one elſe; as if a wife ſhould purchaſe the ſon of her huſband, and ſhould afterwards die, leaving behind her huſband and brother; in which caſe the child becomes free, and the father is not in any degree reſponſible; and ſo alſo in the caſe in queſtion.—(It is to be obſerved that the ſlave in queſtion muſt perform emancipatory labour to the proprietor of the ſtock, to the amount of his ſhare in him, as the proprietor's property is involved in his perſon; he muſt therefore perform emancipatory labour, in the ſame manner as in a caſe of *inheritance*.)

---

* Becauſe the ſlave, by becoming free *in part*, is rendered unſaleable, and obtains a claim to freedom. (See *Manumiſſion.*)

† For, as no profit has been, as yet, gained upon the ſtock, and as the *profit* is the only thing in which the manager has any ſhare, it follows that no part of the *manager*'s property is expended in the *purchaſe*.

Caſe of the manager purchaſing a female ſlave, and begetting a child upon her.

IF a perſon give one thouſand *dirms* to be managed, in conſideration of a moiety of the profit, in the way of *Mozâribat*, and the manager purchaſe, for the thouſand *dirms*, a female ſlave of the value of theſe thouſand, and afterwards have carnal connexion with her, and ſhe in conſequence produce a child alſo valued at one thouſand *dirms*, and the manager claim the child, and the child afterwards increaſe in value to fifteen hundred *dirms*, in this caſe the proprietor of the ſtock has it at his option either to claim emancipatory labour from the ſlave [the manager's child] to the amount of one thouſand two hundred and fifty *dirms*; or to emancipate him: but the manager does not owe any indemnification to the proprietor for his ſhare, though he be rich. The reaſon of this is that there is a preſumption of the validity of the claim here made, ſince it is poſſible that the female ſlave may be the *wife* of the manager, by her former proprietor having firſt contracted her in marriage to him, and afterwards ſold her to him in behalf of the *Mozâribat* ſtock; and that the child which ſhe produced may have been the iſſue of his cohabitation with her:—but his claim to the child was not effectual, (that is to ſay, the child was not emancipated,) becauſe the condition of its emancipation (namely, his right of property in the ſlave) did not in any reſpect appear, as no profit had as yet ariſen from her; for the value of each (namely, of the mother and child) was exactly equal to the amount of the ſtock, and conſequently no profit exiſted in either of them; in the ſame manner as where the *Mozâribat* ſtock conſiſts of different ſubſtances, and the value of each ſubſtance is equal to the ſtock;—in this way, that a perſon purchaſes, with a ſtock of one thouſand *dirms*, two ſlaves, and each of them afterwards becomes worth one thouſand *dirms*,—in which caſe no profit is held to exiſt in either of them; and ſo alſo in the caſe in queſtion;—and as no profit appears, it follows that the manager obtains no ſhare whatever in either the ſlave or the child, and conſequently that his claim is invalid: but upon the child exceeding the ſtock in value, a profit then appears, and conſequently the claim formerly made then becomes valid.—It were otherwiſe if the manager were firſt to emancipate the child *, and afterwards the value of him to riſe, for this emancipation would be altogether invalid, (that is to ſay, would be ineffectual *after* the appearance of profit, as well as *before*,) becauſe the liberation is an indication of manumiſſion, and the indication being null at the time, from non-exiſtence of a *preſent* right of property †, cannot afterwards become effectual in conſequence of a *ſupervenient* right; whereas *claim*, on the other hand, is an expreſs *notification*, and hence may lawfully be admitted as effectual, in conſequence of a ſupervenient right;—(in the ſame manner as where a perſon, having declared the ſlave of another to be *free*, afterwards purchaſes him; in which caſe the ſlave, after the purchaſe, becomes free, in virtue of the previous declaration;)—and the claim being effectual after the exiſtence of profit, and the *parentage*, alſo, being eſtabliſhed, it follows that the child is free, in virtue of the manager's right of property in a part of him: and no compenſation for any part of his value is due from the manager to the proprietor of the ſtock, whether the manager be rich or poor; becauſe the freedom of the child is eſtabliſhed in virtue of the parentage, and alſo in virtue of the manager's *right of property*; (that is to ſay, in virtue of *both*:)—but as the right of property is eſtabliſhed *ſubſequent* to the parentage, the freedom is therefore referred to the *right of property*, which takes place independant of the will and endeavour of the manager, and in which therefore he is guilty of no *tranſgreſſion*; and as the indemnification for emancipating a ſlave* is an *indemnification for damages*, it is not due but in a caſe of *tranſgreſſion*.—The proprietor of the ſtock is entitled, on this occaſion, to demand emancipatory labour of the male ſlave, becauſe the property which he had in him remains, as it were, *detained* in him;—and he is alſo at liberty to *emancipate* him, becauſe a ſlave who owes emancipatory labour is (according to *Haneefa*) like a *Mokâtib*; and the proprietor is therefore empowered to emancipate him.—If the proprietor require the *labour*, the ſlave muſt perform it to the amount of *one thouſand two hundred and fifty dirms*; for the proprietor is entitled to *one thouſand* on account of *the ſtock*; and the remaining five hundred, which is the *profit*, is equally ſhared between him and the manager; the *labour*, therefore, muſt be performed to the amount above ſtated: and upon the proprietor thus obtaining that amount of him, he is then entitled to take an equivalent for half the value of the *mother*; becauſe the proprietor being entitled to *one thouſand* DIRMS out of the *twelve hundred and fifty*, on account of the ſtock, (which claim muſt always be firſt ſatisfied,) it follows that the female ſlave is *altogether profit*, and is therefore equally ſhared between the proprietor of the ſtock and the manager: and as the manager formerly preferred a claim that was valid, (ſince there was a preſumption that he might have cohabited with the female ſlave in virtue of marriage,) and the efficiency of which remained ſuſpended only on account of the defect in his right of property, and became effectual on the eſtabliſhment of that right, by which means the female ſlave becomes his *Am-Walid*,—he [the manager] is therefore reſponſible for the ſhare of the proprietor, whether he be *rich* or *poor*, becauſe the reſponſibility in this inſtance is *reſponſibility for aſſumption of property*, and a reſponſibility of this nature does not remain ſuſpended on *tranſgreſſion*;—in the ſame manner as where a perſon, in virtue of marriage, cohabits with the female ſlave of another, and a child is born of her, and this perſon afterwards obtains, by inheritance, a right of property in her, jointly with another perſon,—in which caſe the perſon in queſtion is reſponſible to the other for his ſhare; and ſo alſo in the caſe in queſtion:—contrary to *reſponſibility for the child*, as before treated of.

---

* That is, he owes him no indemnification for the vitiation of his property in the ſlave from this circumſtance.

---

* That is to ſay, "*it were otherwiſe if the manager's claim (involving the emancipation* "*of the child) were firſt admitted*, &c."

† As the manager acquires no right of property in the child until ſuch time as a profit be obtained upon it.

---

* As where a *partner* (for inſtance) emancipates his ſhare in a ſlave, which induces his ultimate freedom *in toto*, and is therefore, in its conſequence, deſtructive to the property of the other partners.—(See *Manumiſſion*.)

CHAP. II.

Of a Manager entering into a Contract of *Mozâribat* with another.

A manager entruſting the ſtock in his hands to a *ſecondary* ma-

If a manager give ſtock to another perſon, in the way of *Mozâribat*, without authority from the proprietor of the ſtock, in that caſe the firſt or principal manager is not reſponſible [for the ſtock] either on account nager, is reſponſible to the proprietor, upon any profit being acquired on it.

account of having ſo given the ſtock to the other, or on account of that other's employment of the ſame, until ſuch time as profit ſhall have been acquired thereon: but whenever profit takes place, then the principal manager becomes reſponſible to the proprietor of the ſtock.—This is recorded by *Haſan* as an opinion of *Haneefa.*—The two diſciples maintain that the primary manager becomes reſponſible, immediately upon the action of the ſecondary manager, whether profit may have been acquired or not: and this is agreeable to the *Záhir Rawâyet.*—*Ziffer* holds that the primary manager is reſponſible for the giving of the ſtock to the other, whether that other may have acted with regard to it or not; (and there is an opinion recorded from *Aboo Yooſaf* to the ſame effect;) becauſe it is lawful for a manager to give the ſtock by way of a *depoſit*, but not by way of *Mozáribat*; and as, in the caſe in queſtion, it was given by way of *Mozáribat*, the manager was therefore guilty of a treſpaſs, and is conſequently liable to reſponſibility.—The argument of the two diſciples is that the ſtock is here in reality given as a depoſit; and is only rendered *Mozâribat* by the action of the *ſecondary* manager;—"therefore (ſay they) there are "two circumſtances in this caſe, and we pay attention to both circumſtances, and determine, accordingly, that reſponſibility takes "place in caſe of the action of the *ſecondary* manager; but if he do "not act, and the property be loſt in his poſſeſſion without any "tranſgreſſion, reſponſibility is not in that caſe incumbent."—The reaſoning of *Haneefa* is that the mere act of *giving*, previous to the *action*, is a *depoſit*, and *after* the action it is an *entruſting*, in the manner of a *Bazát*; and as both theſe deeds are lawful to a manager, he is not conſequently reſponſible for either of them:—but, upon profit accruing, the firſt manager renders the ſecondary one a ſharer with him in the ſtock, and is therefore reſponſible in the ſame manner as if he had mixed the ſtock with the property of another, in which caſe he would have become reſponſible in conſequence of his having rendered that other a ſharer in the ſtock; and ſo alſo in the caſe in queſtion. All this proceeds on a ſuppoſition of both the *Mozáribats* being *valid:* but if one or both of them be invalid, then the primary manager is not reſponſible, though the ſecondary manager ſhould have acted with regard to the property; becauſe, in ſuch caſe, the ſecondary manager is conſidered as a *hireling*, entitled to an adequate *hire*, and not to any ſhare in the *profit*. *Mohammed*, in the *Mabſoot*, obſerves that, in caſe of the validity of the *Mozâribat*, the primary manager becomes reſponſible; but he has not ſtated the conſequences with regard to the *ſecondary* manager.—Some have ſaid that he is not reſponſible, according to *Haneefa*, and that he is ſo, according to the two diſciples; proceeding on the different opinions which they have maintained with regard to the truſtee of a truſtee,—*Haneefa* holding the *principal* and not the *ſecondary* truſtee to be reſponſible; and the two diſciples holding the proprietor to be at liberty to take the compenſation from which ever he chuſes; and ſo alſo in the caſe in queſtion.—Others, again, have ſaid that the proprietor is at liberty, in the opinion of all our doctors, to take a compenſation either from the *principal* or the *ſecondary* manager; and this is the common opinion.—This is evidently the opinion of the two diſciples, becauſe, according to them, a ſecondary truſtee is reſponſible:—and it is alſo evidently agreeable to the opinion of *Haneefa*; becauſe the principal manager was guilty of a tranſgreſſion, in giving the ſtock to the ſecondary manager without the proprietor's permiſſion; and the ſecondary manager was alſo guilty of a tranſgreſſion, in taking poſſeſſion of the property of another without his conſent.—Reſpecting the two caſes of a *manager* and a *truſtee*, the difference between them, according to *Haneefa*, is that the ſecondary *truſtee* takes poſſeſſion of the depoſit with a view to the benefit of the *principal* truſtee, and is therefore not reſponſible;—whereas the ſecondary *manager* ſeizes the ſtock with a view to his *own* profit; on which account it is proper to make him reſponſible. It is to be obſerved that, upon the primary manager becoming reſponſible for the ſtock, the contract of *Mozâribat* between him and the ſecondary becomes valid; and the profit is participated between them agreeably to their ſtipulation; becauſe the primary

manager

manager becomes *proprietor* of the *Mozâribat* ſtock, in conſequence of his reſponſibility, from the time that he exceeded his authority, by making it over to another without the owner's conſent, whence it is the ſame as if he had ſo given *his own* property.—If the proprietor, on the other hand, ſhould require the indemnification of the *ſecondary* manager, then the ſecondary muſt revert for ſatisfaction to the *primary* manager, becauſe of their contract of *Mozâribat*, as he acts on behalf of the primary manager;—in the ſame manner as where a proprietor takes a compenſation from the truſtee of an uſurper, in which caſe the truſtee has recourſe to the uſurper; and ſo likewiſe in the caſe in queſtion: and alſo, becauſe the principal manager deceived him in the body of the contract. And in this caſe alſo the contract of *Mozâribat* between the primary and ſecondary managers is valid, becauſe reſponſibility ultimately falls upon the *primary* manager, and it is therefore the ſame as if the proprietor had taken a compenſation from him firſt:—but the profit, in this caſe, is fair and lawful to the *ſecondary*, and not to the *primary* manager; becauſe the ſecondary is entitled to the profit on account of his management, in which there is no baſeneſs; but the principal is entitled to profit merely from his *right of property*, which, being founded only on the payment of the compenſation, is not altogether free from baſeneſs, ſince a right of property merely *conſtructive* is in *one* ſhape eſtabliſhed, but in *another* ſhape it is *not* eſtabliſhed.

Caſe of a manager entruſting the ſtock to a ſecondary manager, with the proprietor's concurrence.

IF a perſon give property to another by way of *Mozâribat*, on condition of half the profit, and with permiſſion to him to give the property to another in the way of *Mozâribat*, and the manager, accordingly, give the ſaid property to another by way of *Mozâribat*, on condition of a *third* of the profit; and the ſecondary manager employ the ſaid ſtock, and acquire profit upon it, in that caſe, if the proprietor ſhould have ſaid to the firſt manager, "Whatever advantage "GOD Almighty may grant upon it is between you and me in an "equal degree," then a half of the whole profit is due to the proprietor,

prietor, one third to the *ſecondary* manager, and one ſixth to the *primary* manager;—becauſe the act of the primary manager, in giving the ſtock to the *ſecondary* manager by way of *Mozâribat*, was lawful, as he had the conſent of the proprietor thereto; but as the proprietor ſtipulated to himſelf *one half* of the whole profit, he is therefore entitled to it, and the remaining half is all with which the manager has any concern; and as he agreed to give a *third* of the whole to the ſecondary manager, there will remain of courſe only *one ſixth* of the whole to him.—One half of the profit is, in this inſtance, fair and lawful to the two managers, although the *primary* manager has not employed himſelf, [with regard to the ſtock,] becauſe the induſtry of the *ſecondary* manager is held to be that of the *primary*:—in the ſame manner as where a perſon hires another to make him a garment for one *dirm*; and the perſon ſo hired hires another to do the work for *half* a *dirm*; in which caſe, although the principal hireling does no work, yet he is fairly and lawfully entitled to the profit of an half *dirm*, as the work of the *ſecondary* is conſidered as *his* work. But if, in the caſe in queſtion, the proprietor ſhould have ſaid, "What-"ever advantage God Almighty gives to you, is between you and "me in an equal degree;" then the ſecondary manager is entitled to one third, and the remainder is divided in an equal degree between the proprietor and the principal manager;—becauſe, in this inſtance, the proprietor commits the diſpoſal of the property to the firſt manager, ſtipulating for himſelf one half of the whole profit which may accrue from it; and as, by this ſtatement, two thirds of the profit accrue, thoſe two thirds are equally divided between the proprietor and the manager.—It is otherwiſe in the *preceding* caſe, becauſe there the proprietor had ſtipulated for himſelf one half of *the whole* profit: hence there is an evident difference between the two caſes.

If the proprietor of the ſtock ſay to the manager, "I give this "ſtock in order that whatever profit may reſult to you therefrom be "equally divided between us;" and, at the ſame time, give him permiſſion

miſſion to have it managed by *Mozâribat*, and if, accordingly, the manager entruſt it to another manager with an agreement of half the profit to him, in this caſe one half of the profit goes to the *ſecondary* manager, and the other half is divided equally between the proprietor and the *primary* manager; becauſe the primary manager has agreed to let the ſecondary manager have one half of the whole profit, and the proprietor of the ſtock having already agreed to this, the ſecondary manager is entitled to one half accordingly; and as the proprietor eſtabliſhed for himſelf one half of the profit that might accrue to the primary manager, and *one half* only of the whole accrues to him, (as the half which goes to the ſecondary muſt neceſſarily be deducted,) it follows that this half is divided between them.

IF a proprietor give ſtock to any perſon by way of *Mozâribat*, upon condition that, of whatever advantage may accrue thereon, one half ſhall come to *him*,—or that, one half of the increaſe, above the original amount, ſhall be divided equally between him and the manager,—and at the ſame time permit the manager to entruſt the ſtock in the way of *Mozâribat* to another, and the manager accordingly give it to another in the way of *Mozâribat*, with an agreement of one half of the profit to him,—in that caſe the proprietor is entitled to one half of the profit, and the ſecondary manager to the other half, whilſt nothing whatever is due to the *primary* manager; for the ſtockholder having conditioned for himſelf one half of the property in an abſolute manner, one half therefore goes to him; and as the principal manager agreed to give one half (which is the ſhare that would be due to himſelf) to the *ſecondary* manager, the ſame muſt therefore be given to him; hence he himſelf is entitled to nothing;—in the ſame manner as where a perſon hires another to make him a garment for one *dirm*, and the perſon ſo hired again hires another to do the work for one *dirm* alſo,—in which caſe the ſecondary hireling would be entitled to the *dirm*, and nothing whatever would be due to the principal; and ſo alſo in the caſe in queſtion.—But if the primary manager agree to give the ſecondary one *two thirds* of the profit inſtead of *one half*, then the proprietor is entitled to one half, and the ſecondary to the other; and the principal manager muſt make good to the ſecondary, from his own property, to the amount of one third of the profit, in order that a complete ſhare of two thirds may be thus rendered to him; for here the *primary* manager ſtipulated to the *ſecondary* a thing which was the right of the *proprietor*; and hence, in reſpect to the proprietor, his agreement is of no effect, ſince, if ſuch were the caſe, it muſt neceſſarily follow that the condition he had himſelf eſtabliſhed was null;—yet there is no illegality in referring the obligation of it to his own perſon, ſince it relates to a fixed and certain object, interwoven in a contract which he was competent to make. Hence he becomes reſponſible for the ſafe delivery of two thirds to the ſecondary, and conſequently the diſcharge of the ſame is incumbent upon him. Beſides, he has deceived the ſecondary in the body of the contract, which is a cauſe of *recourſe*,—that is to ſay, entitles the ſecondary to revert and have recourſe to the principal;—in the ſame manner as where a perſon has been hired to make a garment for one *dirm*, and he again hires another to do the work for one *dirm* and an half,—in which caſe the ſecondary hireling is entitled to an half *dirm* from the property of the principal hireling;—and ſo likewiſe in the preſent caſe.

SECTION.

The contract may ſtipulate a proportion of the profit to the ſlave of the proprietor.

If a manager ſtipulate to give one third of the profit to the proprietor of the ſtock, one third to the ſlave of the proprietor, (on condition of aſſiſtance in the labour,) and the remaining third to himſelf, it is lawful, whether the ſlave be indebted or not; becauſe the ſeizin of a ſlave is valid; (eſpecially where he is a *Mazoon*, or *privileged*

vileged ſlave; and in the preſent caſe the ſlave is *privileged*, inaſmuch as the condition of his working with the manager endows him with a privilege; and agreeably to the rule of the ſeizin of a ſlave being valid, a maſter is not permitted to take from a truſtee the depoſit which may have been made by his ſlave, although the ſlave be not *privileged*; and on the ſame principle, alſo, a maſter may ſell any thing to his ſlave, provided he be *privileged*:)—and the ſeizin of the ſlave being valid, it follows that the condition of his uniting in the management is not repugnant either to the *delivery* of the ſtock *, or to the diſtinction between the *ſtock* and the *manager*: the condition is therefore approved †. (It is otherwiſe where it is made a condition that the proprietor of the ſtock ſhall himſelf work, becauſe that is preventive of a delivery ‡, and conſequently invalid, as has been already explained.)—The contract of *Mozâribat*, therefore, being valid, one third of the profit goes to the manager, and two thirds to the proprietor of the ſtock; becauſe the earnings of the ſlave are the property of the maſter, if he be not indebted; and if he be indebted they are the property of the creditors.—The doctrine here laid down proceeds on a ſuppoſition that the *maſter*, and not the *ſlave*, has concluded the contract of *Mozâribat*;—for if a privileged ſlave enter into a contract of *Mozâribat* with a ſtranger, ſtipulating that his maſter ſhall act with the manager in the management of the ſtock, the contract is invalid, provided the ſlave be free from debt; becauſe in that caſe the *Mozâribat* ſtock is the property of the maſter §; and as it is ſtipulated that the maſter ſhall unite in the management,

But if a ſlave engage in ſuch a contract on behalf of his maſter it is invalid.

---

* To the ſlave, for the purpoſe of management.

† If a ſlave were incapable of making ſeizin, it would follow that a delivery of the ſtock to the ſlave (for the purpoſe of managing it) would, in fact, be a return of it to the *proprietor*, his maſter, and conſequently the contract would be rendered *nugatory*.

‡ Since ſuch delivery would be a return of it to the proprietor, which would invalidate the contract.

§ Whereas, if the privileged ſlave were involved in debt, the ſtock entruſted by him to the manager would (in common with his other property) be the right of his *creditors*.

management, it is requiſite that he make ſeizin of it for that purpoſe; but the ſeizin of the proprietor is repugnant to a due *delivery* *. If, however, the ſlave be *inſolvent*, the contract is valid, as in that caſe the maſter ſtands in the ſame relation as a ſtranger, according to *Haneefa*.

CHAP. III.

Of the Diſmiſſion of a Manager; and of the Diviſion of the Property.

The contract is diſſolved by the death of either party,

If either the proprietor of the ſtock or the manager ſhould die, the contract becomes null; becauſe a contract of *Mozâribat* (as has been already explained) is in the nature of an appointment of agency; and agency ceaſes by the death either of the conſtituent or of the agent; and inheritance does not take place with regard to agency, as has been already demonſtrated.

or by the apoſtacy and expatriation of the manager.

If the proprietor of the ſtock become an apoſtate, and be united to a foreign country †, the contract of *Mozâribat* becomes null; becauſe his being united to a foreign country is equivalent to his *death*, (whence it is that his property is then divided amongſt his heirs.)—If, on the other hand, he ſhould *not* be united to a foreign country, the tranſactions of his manager remain *ſuſpended* in their *effect*;—(that is to ſay, if he again become a *Muſſulman*, they then take effect:) but if he die in his apoſtacy, they then become null, (according to *Haneefa*,) becauſe his manager's tranſaction [with the ſtock] is the ſame as his own tranſaction, ſince the manager acts *on his own account*; and as (according to *Haneefa*) the acts of an apoſtate are ſuſpended in their effect *, ſo, in the ſame manner, the acts of his *manager* are ſuſpended.

---

* Becauſe, as the property of the *ſlave* is, in effect, the property of his *maſter*, it follows that a delivery to the maſter would be nugatory.

† By a ſentence of the *Kâzee*. (See *Inſtitutes*, Vol. II. p. 229.)

IF the *manager* become an apoſtate, yet the contract ſtill continues to exiſt in its original ſtate, becauſe the actions of a perſon are ſuſpended in their effect, only on account of a ſuſpenſion of his right of property: but the apoſtate in queſtion has no right of property in the *Mozâribat*-ſtock, as that belongs ſolely to the *proprietor* of the ſtock; and as the *proprietor*'s right of property is not ſuſpended, the contract of courſe ſtill continues in force.

If the manager apoſtize, without going to a foreign country, the contract ſtill continues in force.

IF the proprietor of the ſtock diſmiſs the manager, and he ſhould not be acquainted with his diſmiſſion until after he had tranſacted by purchaſe and ſale, then thoſe tranſactions are valid; becauſe he acts as an *agent* on behalf of the proprietor; and the diſmiſſion of an agent, if it be voluntary and intended, (that is to ſay, not *virtual*, ſuch as by *death*,) remains ſuſpended upon a knowledge of it; for diſmiſſion is a prohibition from action; and prohibitions, in injunctions reſpecting any matter, do not operate until after knowledge of them, as in the caſe of the commands and prohibitions of the LAW.

All acts of the manager are valid, until he be duly apprized of his diſmiſſion.

IF the proprietor of the ſtock diſmiſs the manager, and he be apprized thereof, he may nevertheleſs ſell ſuch of the *Mozâribat* ſtock as conſiſts of chattels and effects, becauſe his diſmiſſion from the agency is not preventive of a ſale of articles of that kind, ſince he has a right to *profit*, which cannot be obtained otherwiſe than by a diviſion;

The manager, after being apprized of his diſmiſſion, may ſtill convert what remains on his hands into money:

---

* See Vol. II. p. 253.

viſion; and this can be effected only by turning the ſubject of the ſtock into ſpecie.—From this neceſſity, therefore, he is at liberty to ſell ſuch ſtock: but, after the ſale, it is not lawful for him to make any purchaſe whatever with the price he procures for theſe effects; becauſe there is no *neceſſity* for his ſo doing, and the *ſale* is admitted only from *neceſſity*, as has been already explained.

but if it have been already converted into money, he cannot tranſact with it; unleſs this money be of a ſpecies different from the original ſtock,—in which caſe he may convert it into money of the ſame ſpecies.

If the proprietor of a ſtock, which had originally conſiſted of *dirms* or *deenars*, diſmiſs the manager at a time when it has been reduced to ſpecie, and the manager be apprized thereof, in that caſe he is no longer entitled to act with regard to it, ſince there exiſts no further neceſſity for his ſo doing.—The author of the *Hedâya* remarks that the law here proceeds on the ſuppoſition that the ſtock has been converted into the very ſame ſpecie with the original ſtock: but that, if it ſhould have been converted into ſpecie of a different denomination, (as if the ſtock had originally conſiſted of *deenars*, and it be now converted into *dirms*, or *vice verſa*,) the manager is, by the *benevolence* of the law, allowed the liberty of ſelling it for the ſame ſpecie as the original ſtock; becauſe it is incumbent upon the manager to return a ſimilar to the original ſtock, which is impracticable otherwiſe than by ſelling what he has on hand for the ſame ſpecie as the original ſtock; and alſo, becauſe, as the profit cannot be aſcertained until the property on hand be converted into ſomething of the very ſame nature as the original ſtock, the caſe becomes exactly the ſame as if the property conſiſted of goods and effects.—It is to be obſerved that all the rules here laid down with reſpect to the *diſmiſſion* of a manager are applicable to the caſe of the death of the proprietor of the ſtock.—Thus, if the proprietor ſhould die, the manager is entitled to ſell the *Mozâribat* ſtock, where it conſiſts of goods and effects:—but he is not allowed afterwards to purchaſe any thing whatever with the price ſo obtained. If, on the other hand, the ſtock has been turned into *dirms* or *deenars*, he is not entitled to act with reſpect to it, provided the money into which it is converted correſpond with the ſpecie of the original ſtock: but if it be *different* from the ſpecie of the original ſtock, he is at liberty to convert it, by ſale, into the ſame ſpecie with the original.

If, at the diſſolution of the contract, the ſtock conſiſt of debts, the manager muſt be compelled to collect them, where any profit has been acquired.

If the proprietor and the manager diſſolve the contract, and the ſtock ſhould at that time conſiſt of debts due from others, in this caſe, where any profit has been acquired, the magiſtrate muſt compel the manager to poſſeſs himſelf of theſe debts; ſince he is held to be equivalent to a *hireling*, and his profit to be like *hire*. But if no profit have been acquired, it is not incumbent upon the manager to receive payment of theſe debts; ſince he is merely a *voluntary agent*, and no compulſion can be uſed for the fulfilment of a *voluntary engagement*; (as where a perſon makes a grant to another without delivering the thing granted, in which caſe the donor cannot be compelled to make delivery of the grant.) The manager, however, is in this caſe to be inſtructed to appoint the proprietor agent in his behalf for the receipt of theſe debts; for as the rights of the contract appertain to the contractor, it is indiſpenſably neceſſary that he thus appoint the *proprietor* his agent, to prevent the loſs of his right. *Mohammed*, in the *Jama Sagheer*, obſerves that "the manager ought to be inſtructed "to make a transfer of his claim upon the debtors to the proprietor;" the meaning of which alſo is, that he ſhould appoint the proprietor his agent for the receipt of the debt; becauſe if ſuch transfer were ſufficient, the proprietor muſt neceſſarily be injured in caſe of the debtors not acceding to the ſame. It is to be obſerved that this is the rule in all caſes of *agency*. Thus, when an agent *for ſale* (for inſtance) is diſmiſſed, he muſt be told to appoint his conſtituent agent for the receipt of the debt, in the manner above mentioned. A *broker*, however, muſt himſelf be compelled to receive any debts that may be due, becauſe with *brokers* the cuſtom is to act for *hire*.

All loſs upon the ſtock is placed againſt the profit.

Whatever may be loſt or deſtroyed, of the *Mozâribat* ſtock, muſt be placed to the account of the *profit*, and not of the *original ſtock*, becauſe the profit being a dependant, it is moſt eligible to refer the loſs to it; in the ſame manner as a loſs in property ſubject to *Zakât* is referred to what is *exempt*[*], and not to the actual *Niſâb*, as the *exempt* property is a dependant of the *Niſâb*.

If more than the profit be loſt, the reſponſibility does not fall on the manager, as he is merely a truſtee.

If the profit be divided previous to a reſtoration of the capital, and any accident afterwards befal the ſtock, the manager muſt return the portion of profit he had received.

If the ſtockholder and the manager divide the profit between them, and continue the contract in exiſtence as before, and the whole or part of the ſtock be afterwards loſt, the manager muſt, in that caſe, return the profit to the proprietor, in order that he may appear to recover this capital; becauſe a diviſion of the profit previous to a reſtoration of the capital is not valid, ſince the profit cannot be aſcertained until the proprietor ſhall have recovered his capital; for the capital is the *principal*, and the profit the *dependant*; and hence, when what remained in the hands of the manager is loſt or deſtroyed, as he is in this caſe ſubject to no reſponſibility, (it being only a *truſt* with him,) it follows that what he and the proprietor had before taken poſſeſſion of is *capital*, and conſequently that he is reſponſible for the portion he had taken, and that the portion taken by the proprietor is alſo accounted as *part of the capital.*

The manager is not reſponſible for *deficiency.*

If, when the proprietor has received back the whole capital, any exceſs remain, ſuch exceſs muſt be divided between him and the manager, as being profit: but if there be a *deficiency*, no compenſation is due from the manager, as he is only a *truſtee.*

The profit received by the manager is no way implicated, with

If the manager and the proprietor, having divided and taken the profit, and annulled the contract of *Mozâribat*, ſhould again enter into a new contract of *Mozâribat*, and the ſtock be afterwards loſt, in this caſe the profit gained upon the firſt *Mozâribat* is not to be returned to the proprietor, becauſe that *Mozâribat* was completed, and the ſecond *Mozâribat* is a *new contract*;—and the deſtruction of the ſtock of the ſecond *Mozâribat* cannot affect the *firſt*;—in the ſame manner as if the proprietor ſhould have given ſome *other* property than that which was the ſubject of the former contract to the manager; in which caſe, if the ſaid additional property ſhould be loſt, it does not affect the contract; and ſo alſo in the caſe in queſtion.

---

[*] Arab. *Aſoo.*—See Vol. I. p. 120.

reſpect to any *new* contract between the ſame parties.

CHAP. IV.

Of ſuch Acts as may lawfully be performed by a Manager.

A manager may ſell the ſtock, either for ready money, or upon truſt:

It is lawful for a manager to ſell the ſtock either for ready money, or upon truſt; becauſe theſe acts are in the nature of *traffic*, and, as ſuch, are included in an abſolute contract.—The period of truſt, however, muſt not be extended beyond what is cuſtomary amongſt merchants, (ſuch, for inſtance, as a period of *ten years*;) becauſe he is only permitted to act according to the common practice and cuſtom of merchants; whence it is that he may lawfully *purchaſe* a *quadruped* for conveyance; but he can only *hire* a *boat*; for ſuch is the cuſtom amongſt merchants.

According to the *Rawâyet Maſhhoor*, a manager is at liberty to give the privilege of trading to a ſlave whom he may have purchaſed with the ſtock, ſince this is in the nature of *traffic*.

or entruſt a ſlave with the management of it:

or (having ſold it for ready money) may grant a ſuſpenſion of payment:

If a manager ſhould ſell part of the ſtock for ready money, and afterwards admit of a ſuſpenſion in the payment, it is lawful, according to all our doctors:—according to *Haneefa* and *Mohammed*, becauſe, as an *agent* is permitted to grant a ſuſpenſion of payment, a *manager*, as having a ſhare in the profit, is entitled to do ſo *a fortiori*; (the manager, however, is not reſponſible, becauſe, as he has a power of diſſolving the ſale, and afterwards ſelling the thing *upon truſt*, the deferring of payment is accordingly lawful: contrary to an agent, as he is reſponſible to his conſtituent for the price of what he ſells, becauſe he is not at liberty to diſſolve a ſale and ſell the article over again upon truſt:)—and according to *Aboo Yooſaf*, becauſe a manager may, if he pleaſe, annul the ſale, and ſell the article over again: contrary to an *agent*, who has no power of diſſolving a ſale.

or allow the purchaſer to transfer the paymentupon another perſon.

If a manager ſhould ſell ſomething to *Zeyd* upon truſt, and *Zeyd*, with the conſent of the manager, ſhould transfer the payment of the price upon *Omar*, this is lawful, whether *Omar* be *rich* or *poor*, becauſe transfer of debts is cuſtomary amongſt merchants.—It is otherwiſe where a guardian aſſents to ſuch a transfer with reſpect to the property of his orphan ward, as he cannot lawfully accept, in his ward's behalf, of a transfer upon a perſon that is *poor*; becauſe the intereſt of the orphan is what muſt be conſulted, (whence the power of a guardian is reſtricted to what may conduce to the *intereſt* of his ward;) and as the acceptance of a transfer upon a perſon that is *poor* is deſtructive of the orphan's intereſt, it is therefore illegal.

The acts of a manager are—ſuch as he is empowered to perform by the contract;

The acts of a *Mozârib*, or *manager*, are of *three kinds*. I. Such as he is competent to perform in virtue of the abſolute contract of *Mozâribat*; including all deeds partaking of the nature of *Mozâribat*, or of its dependences; ſuch, for example, as *agency* for *purchaſe* or *ſale*,

ſale, becauſe of the neceſſity for thoſe acts; and alſo *pawn*, as this is in the nature of a diſcharge or ſatisfaction; and likewiſe *depoſit*, *hire*, entruſting in the manner of *Bazât*, and alſo travelling with the ſtock, as before mentioned.—II. Such deeds as he is not competent to perform in virtue of the abſolute contract, but in virtue of a general power granted him by the proprietor, to act agreeably to his own judgment and diſcretion; including all ſuch deeds as may have a probable connexion with a contract of *Mozâribat*; and which are accordingly held to be connected with it, when there exiſts any argument for their being ſo;—ſuch as the giving of the ſtock to another in the way either of *Mozâribat*, or of partnerſhip, or the mixing of it with the manager's own property, or with that of another;—to which acts a manager is not competent, merely in virtue of the abſolute contract, except where ſomething argues a connexion between the *act* and the *contract*; becauſe it is preſumed that the proprietor of the ſtock intends that the *manager* alone ſhould be his partner, and not any other perſon; and theſe acts are not in the nature of *traffic*, (as traffic does not depend upon ſuch acts,) and conſequently are not comprehended in the abſolute contract: yet, as they are all inſtruments of an increaſe of profit, and are therefore admiſſible in a contract of *Mozâribat*, they are accordingly included in the contract, where any argument exiſts of their ſo being; and the power granted to the manager by the proprietor "to act according to his own diſcretion,' clearly argues thus much.—III. Such deeds as the manager is not competent to perform, either in virtue of the abſolute contract, or from the diſcretionary power granted him by the proprietor, being neither in the nature of *traffic*, nor having any probable connexion with the contract, but ſuch as he may perform in caſe of an expreſs power from the proprietor of the ſtock. Theſe are termed *Iſtidânit* *; ſuch as where a manager purchaſes ſomething in exchange for *dirms* and *deenars*, after having laid out the whole capital in the purchaſe of goods and effects,

or in virtue of a general and diſcretionary power veſted in him by the proprietor;

or ſuch as he is not empowered to perform in either way.

---

* Anglicé.—*Deſiring to borrow.*—In its common acceptation, it ſignifies *contracting debt*, on behalf either of one's ſelf or of another.

in which caſe the tranſaction relates entirely to the manager, and he is entitled to all the profit as well as ſubject to the loſs or debts that may reſult from it: or, where a manager lays out, in purchaſing goods, more than the amount of the capital, in which caſe what is tantamount to the ſtock is conſidered as belonging to the *Mozâribat*; and the profit, loſs, or debts reſulting from the exceſs, relate ſolely to the manager: or, where the ſtock conſiſts of *dirms* and *deenars*, and the manager purchaſes ſomething in exchange for articles of weight, meaſurement of capacity, or of tale; for, in that caſe, as the manager makes the purchaſe with ſomething elſe than the ſtock, it is conſidered as an *Iſtidânit*, and operates entirely with reſpect to the manager; that is to ſay, the profit, loſs, and debts ariſing from it, relate entirely to him, and not to the proprietor of the ſtock; the reaſon of which is, that *Iſtidânit* is a tranſaction with reſpect to other property than the capital; and as the agency is confined to the *capital*, the manager is of courſe not competent to ſuch tranſaction.—Moreover, the property, in this caſe, exceeds the amount of that which was the ſubject of the contract, to which the proprietor has not aſſented; and although, in ſuch exceſs of property, there be advantage, yet it is not free from the riſk of loſs, and of its producing debts.—If, however, the ſtockholder give his aſſent to the *Iſtidânit*, then the thing which the manager may have purchaſed is participated between him and the ſtockholder, in the manner of a *Shirkat Wadjooh*, or partnerſhip upon perſonal credit*, which ſignifies, where two perſons are partners without either ſtock or labour, and purchaſe ſomething *upon credit*, to be paid for at a future period, and ſell it again. Of the third ſpecies of acts in *Mozâribat* is alſo the taking of *Sifatja*, which is a ſpecies of *Iſtidânit*, and the *giving* of *Sifatja*, which reſembles a *loan*.—*Sifatja* means the delivery of property to another by way of *loan*, and not by way of *truſt*, in order that that other may deliver it to ſome friend of his; and the object of it is to avoid the dangers of the road.—In the ſame manner alſo emancipation, either in exchange for property, or without property in exchange, and contracts of *Kitâbat*, are of the third ſpecies of acts in *Mozâribat*, as not being in the nature of *traffic*:—and the ſame of *gifts*, *loans*, and *charities*, which are mere gratuitous acts.

---

* See Vol. II. p. 324.

A manager is not allowed to contract male and female ſlaves (forming a part of the ſtock) in marriage to each other.

IT is not permitted to a manager, according to *Haneefa* and *Mohammed*, to join in marriage male and female ſlaves which are of the ſtock of the contract.—It is recorded as an opinion of *Aboo Yoosaf*, that he may contract in marriage a *female* but not a *male* ſlave, becauſe the beſtowing of a female ſlave in marriage is in the nature of acquiſition, ſince her *dower* is obtained from it, and her maintenance annulled.—The argument of *Haneefa* and *Mohammed* is, that the beſtowing of a female ſlave in marriage is not in the nature of *traffic*, and a contract of *Mozâribat* includes only agency in ſuch things as relate to *traffic*, whence this is the ſame as the making a ſlave *Mokâtib*, or the emancipating him in exchange for property; for in both theſe caſes there is an acquiſition of property; but as neither of them relates to *traffic*, they are not included in a contract of *Mozâribat*; and ſo alſo in the caſe in queſtion.

Any part of the ſtock delivered by the manager to the proprietor in the manner of a *Bazât*, ſtill continues to appertain to the *Mozâribat* ſtock.

IF the manager deliver any part of the *Mozâribat* ſtock to the proprietor, as a *Bazât*, and he make purchaſe and ſale with it, it continues to belong to the *Mozâribat* ſtock, in the ſame manner as before. *Ziffer* ſays that the *Mozâribat* is annulled; becauſe the proprietor, in this inſtance, acts with what is *his own*, and he is incapable of being the manager's agent in work which he performs with his own property: the proprietor, therefore, on this occaſion, may be ſaid to have *taken back* ſo much of the *Mozâribat* ſtock; whence it is that a contract of *Mozâribat* is not valid where the labour of the proprietor is ſtipulated for at the time of making the contract.—The argument of our doctors is, that after the *Mozâribat* ſtock has been duly delivered to the manager, and taken poſſeſſion of by him, and the manager has thus

Digitized by Google

thus acquired a right of tranſacting with it, the proprietor is fully capable of acting as an agent on behalf of the manager, in tranſacting with the ſtock; and as making it over in the way of *Bazát* amounts to a commiſſion of agency, it follows that (in this view) the proprietor cannot be conſidered merely as *receiving back* his ſtock. It is otherwiſe where the proprietor's uniting in the management is made a condition of the contract, originally, as this is repugnant to the delivery of the ſtock to him for the purpoſe of management, and alſo to his taking poſſeſſion of it. It is alſo otherwiſe where the manager makes over the ſtock to the proprietor in the way of *Mozáribat*, which is not lawful; becauſe a contract of *Mozáribat* is a contract of partnerſhip in the profit derived from the ſtock of the proprietor and the labour of the manager; and, in the caſe in queſtion, none of the ſtock appertains to the manager; whence, if this were allowed, it would follow that both the ſtock and the labour proceed from one party; and this defeats the uſe of the contract.

Objection.—Making it over as *Bazát* alſo defeats the uſe of a contract of *Bazát*, as a contract of *Bazát* ſignifies the ſtock being found by *one* party, and the labour by *another*; and if, in the caſe in queſtion, this were admitted, it would follow that both the *ſtock* and the *labour* proceed from one party.

Reply.—*Bazát* ſignifies ſimply, *agency*; and as a manager is endowed with a power of tranſaction, it follows that his delivering the ſtock, as *Bazát*, is a commiſſion of agency, proceeding from him, in regard to a thing concerning which he is empowered.

—It is to be obſerved that, the ſecondary *Mozáribat* not being valid, the proprietor's management with the property ſtill remains ſubject to the orders of the manager; and hence the primary *Mozáribat* is not annulled.

No part of, the manager's expence to be de-

If the manager tranſact his buſineſs in his own city, his maintenance does not fall upon the ſtock. If, however, he *travel* with it, his proviſions and clothing are to be furniſhed out of the ſtock;—and the frayed unleſs he *travel*

the ſame, alſo, of his conveyance, (that is to ſay, it is alſo lawful for him to purchaſe or hire a quadruped to carry him from place to place, at the expence of the ſtock,) for this reaſon, that a ſubſiſtence is due to him on account of his confinement, in the ſame manner as the ſubſiſtence of a *Kázee*, who, as being in a ſtate of *confinement*, in the exerciſe of his public duties, is entitled to a recompence from the public treaſury,—or like a wife, who is entitled to ſubſiſtence from her huſband, becauſe of her being in his cuſtody:—for the manager, ſo long as he remains in his own city, reſides there merely as it is his home, and not on account of the *Mozâribat* in particular: but upon his *travelling* he becomes confined on behalf of the *Mozâribat*, and is therefore entitled to ſubſiſtence out of the *Mozâribat* ſtock.—It is otherwiſe with an *hireling*, who is not entitled to any ſubſiſtence although he travel, becauſe he is already entitled to a compenſation, namely, his *wages*, which are certain, and for which, if he were ſubſiſted out of the ſtock entruſted to his management, there would be no abſolute neceſſity:—whereas a manager, on the contrary, is not entitled to any thing but his ſhare of the profit; but profit is uncertain; (in other words, it is poſſible that a profit may be gained; and it is alſo poſſible that no profit may be gained;) if, therefore, the manager were obliged to furniſh his own maintenance, he might be a *loſer*.—It is otherwiſe, alſo, in a caſe of invalid *Mozâribat*, becauſe the manager, in ſuch a caſe, is entitled to *wages*: and it is likewiſe different from a caſe of *Bazât*, ſince a perſon who undertakes the management of a *Bazât* gives his labour gratuitouſly, and is therefore not entitled to a ſubſiſtence.—It is to be obſerved that if, on the manager's return into his own city, there remain any victuals or clothing in his hands, he muſt return them into the *Mozâribat* ſtock, ſince his right to thoſe articles no longer remains, becauſe of his return into his own city.

to a diſtance beyond a day's journey

If a manager go forth from his place of reſidence to a diſtance ſhort of what conſtitutes a *journey*, his maintenance does not fall upon the from the uſual place of his abode: the ſtock; for, where he goes only to ſuch a diſtance as that, if he ſet off in the morning, he may by the evening return and paſs the night at home with his family, he is as any other merchant of the place.—If, however, he go to ſuch a diſtance as not to be able to return home the ſame evening, his maintenance is due from the ſtock, ſince he is abſent upon the buſineſs of the *Mozáribat*.—*Nifka*, or ſubſiſtence, ſignifies ſuch things as are expended in the ſupply of our daily wants, ſuch as meat, drink, and clothing; and among theſe things, alſo, is the hire of a waſherman, and other ſervants, and the maintenance of a quadruped for riding; and oil for anointing, where that is commonly uſed, as in *Mecca*.—It behoves the manager not to expend any of thoſe articles of ſubſiſtence in a degree beyond what is cuſtomary; inſomuch that, if he exceed in his expences what is cuſtomary among merchants, he is reſponſible for the exceſs. *Medicine* uſed by a manager, however, muſt be furniſhed at his own coſt, according to the *Záhir Rawáyet*. It is recorded from *Haneefa*, that medicine is included in the ſubſiſtence; becauſe this is taken for the preſervation of health; and as it is impoſſible that he ſhould engage in commercial tranſactions unleſs he be in health, it conſequently partakes of the nature of ſubſiſtence.—The reaſon for what is ſaid in the *Záhir Rawáyet* upon this point is, that the neceſſity of *ſubſiſtence* is known and certain. Medicine, on the contrary, is neceſſary only in caſe of ſupervenient ſickneſs; and as ſickneſs ſometimes occurs, and ſometimes does not occur, it follows that medicine is no part of maintenance; and hence it is that, although a wife's maintenance muſt be furniſhed by her huſband, yet ſhe finds herſelf in medicine at her own expence.

and it is defrayed out of the *profit*, not out of the *ſtock*. WHEN a profit is gained, the proprietor firſt takes the whole *capital ſtock*, and then the remainder is divided between both the parties according to ſtipulation:—the ſubſiſtence of the manager, therefore, is taken from the *profit*, and not from the *capital*, although the manager ſhould have expended out of the capital for his ſubſiſtence.

All expences incident to the ſale of ſtock muſt be defrayed out of *that*.

If the manager ſell goods and effects in the way of traffic, he muſt charge the expence attending theſe goods and effects (ſuch as *porterage* and *brokerage*) to the account of the capital ſtock:—but he is not to charge the capital with what he expends upon himſelf for ſubſiſtence; for this reaſon, that it is the cuſtom of merchants to charge the *former* to the account of their capital, but not the *latter*; and alſo, becauſe the former enhances the value of the goods, but not the latter.

All expences upon articles purchaſed, which do not ſubſtantially add to the article, are voluntary on the part of the manager.

If a manager have in his hands one thouſand *dirms*, and lay them all out in the purchaſe of cloth, and expend one hundred *dirms* of his own property in bleaching and porterage, and the proprietor of the ſtock had deſired him to act according to his own diſcretion,—in this caſe the manager is accounted to have acted voluntarily, becauſe as he hereby ſubjects the proprietor of the ſtock to a debt, it follows that the proprietor's inſtruction to him to act according to his own diſcretion, does not include a tranſaction of this nature, as was formerly explained.—If, on the other hand, the manager, in the caſe in queſtion, expend one hundred *dirms* of his own in dying the cloth *red*, he is a partner in the exceſs occaſioned by the dying, becauſe the colour is a ſubſtantial property exiſting in the cloth: hence, when the cloth is ſold, the manager receives his ſhare in reſpect to the *colour*; and alſo his proportion of the cloth, as undyed, according to the contract of *Mozâribat*: contrary to the caſe of *bleaching* and *porterage*, as that does not occaſion any additional ſubſtantial property to exiſt in the cloth;—whence it is that if an uſurper bleach cloth which he has ſeized, without the conſent of the owner, and the value be enhanced by the bleaching, yet the proprietor is at liberty to take back the cloth without making him any compenſation;—whereas, if the uſurper dye the cloth *red* or *yellow*, the owner is not at liberty to take it back without making a compenſation, but has it at his option either to take the cloth, allowing the uſurper the difference occaſioned in the value by dying,—or to take an indemnification for the value of the cloth as it ſtood at the time of dying, and ſuffer it to remain with the uſurper. It is to be obſerved that, on the manager becoming a *partner* in the cloth in conſequence of the dying, he is not reſponſible for any thing, becauſe the proprietor's direction to him, "to act according to his "own diſcretion," comprehends a liberty to the manager to mix his own property with the *Mozâribat* ſtock; as was before mentioned.

SECTION.

Caſe of loſs of the ſtock after a profit having been acquired and a debt incurred upon it.

If a manager, having one thouſand *dirms* in his hands, under an agreement of *half the profit*, purchaſe *linen* (for inſtance) to the amount of one thouſand *dirms*, and ſell the ſame for two thouſand *dirms*, and again purchaſe a ſlave for two thouſand,—and ſhould not pay the price of either article, (that is, of the *cloth*, or of the *ſlave*,) until ſuch time as theſe two thouſand *dirms* periſh in his hands, in this caſe the proprietor of the ſtock muſt make ſatisfaction to the amount of fifteen hundred *dirms*, and the manager to the amount of five hundred; and *one* fourth of the ſlave appertains to the manager, and *three* fourths to the *Mozâribat* ſtock.—The compiler of the *Hedâya* remarks that what is here ſaid is the neceſſary reſult of the caſe; for the *whole* of the price is incumbent upon the manager, (ſince *he* is the contracting party in the purchaſe;) but yet he is entitled to call upon the proprietor of the ſtock for fifteen hundred *dirms*; the proprietor, therefore, is reſponſible for fifteen hundred, (at the *end* of the tranſaction, not at the *beginning* of it,) for this reaſon, that when the *Mozâribat* ſtock * was converted into caſh, a profit appeared upon it, of which five hundred *dirms* go to the manager: conſequently, upon his purchaſing the ſlave for *two* thouſand, he purchaſes one fourth of the ſlave on *his own* account, and three fourths on account of the *Mozâribat*, (according to the diviſion of the two thouſand;) and upon the two thouſand periſhing, the price of the ſlave is due from him, as it is he who made the bargain for him; but he is entitled to call upon the proprietor for *three fourths* of the price, becauſe he acts as his agent in the purchaſe thereof. The manager's ſhare, which is *one fourth*, is detached from the *Mozâribat* ſtock, for that is ſecured; (that is to ſay, it is incumbent upon the manager to give one fourth of the price to the ſellers [of the ſlave and cloth] after the deſtruction of the *ſtock*;) but the *Mozâribat* ſtock is a *truſt*; and a property *ſecured* is inconſiſtent with a property *in truſt*: it is therefore indiſpenſable that the manager's ſhare be ſo detached;—and three fourths of the ſlave continue in the *Mozâribat* ſtock, for in that there is nothing inconſiſtent with *Mozâribat*:—conſequently the capital then becomes *two thouſand five hundred*, becauſe the proprietor of the ſtock has given to the manager, in the *firſt* inſtance, one thouſand *dirms*, and fifteen hundred in the *ſecond* inſtance.—The ſlave, however, cannot be ſold, ſo as to make any *profit* of him, for leſs than *two thouſand*, becauſe he has been bought for *two thouſand*.—With reſpect to what is above ſaid, that "the *fourth* of the ſlave is detached, and the other three "fourths continue in the *Mozâribat* ſtock,"—the uſe of this appears where the manager ſells the ſlave (ſuppoſe) for four thouſand *dirms*,—for in this caſe the *capital*, which is two thouſand five hundred *dirms*, muſt be deducted from that proportion which appertains to the *Mozâribat*, which is three thouſand *dirms*,—and conſequently a profit of five hundred remains to be ſhared between the parties.

---

* Namely, the linen.

Caſes of ſale by the employer to the manager,

IF the manager be poſſeſſed of one thouſand *dirms*, and the proprietor of the ſtock purchaſe a ſlave for five hundred *dirms*, and ſell him to the manager in return for the capital ſtock, (namely, one thouſand *dirms*,) he [the manager] is conſidered as ſelling him [the ſlave] by a

Morábihat ſale, at the rate of five hundred *dirms**; for ſuch ſale is lawful, becauſe of the difference of views in it,—ſince the view of the proprietor of the ſtock is to obtain one thouſand *dirms*, at the ſame time ſecuring the continuance of the *Mozáribat* contract; and the view of the manager is to obtain poſſeſſion of the ſlave.—The ſale, therefore, is lawful, that the ends of both parties may be anſwered, although it be a ſale of property belonging to the party for property belonging to the party.—There is, however, in this ſale, a *ſemblance* of illegality; ſince the ſlave does not, in fact, paſs out of the property of the proprietor of the ſtock; and a *ſemblance* is connected with a *reality* in any matter concerning which caution is requiſite.—Now caution is requiſite in a *Morábihat* ſale, ſince the points on which it turns are *confidence*, and a caution againſt the ſemblance of deceit: and accordingly, in the *Morábihat* ſale, regard is had to the *loweſt* price, which is five hundred *dirms*.

or by the manager to the employer.

If a manager, poſſeſſed of ſtock to the amount of one thouſand *dirms*, purchaſe a ſlave for thoſe thouſand, and ſell him to his employer for twelve hundred, he is conſidered as ſelling him, by a *Morábihat* ſale, for eleven hundred, ſince the contract in queſtion is conſidered, with reſpect to one half of the profit, (which is the proprietor's ſhare) as non-exiſtent:—as was formerly explained in treating of *Morábihat* ſales.

Caſe of a ſlave purchaſed by the manager, and who is afterwards guilty of homicide.

If a manager be poſſeſſed of one thouſand *dirms*, under a condition of half the profit, and with theſe thouſand purchaſe a ſlave valued at *two* thouſand, and the ſlave accidentally ſlay a perſon, three fourths of the atonement reſt upon the proprietor of the ſtock, and one fourth upon the manager;—becauſe, as the atonement is an expence attendant upon the right of property, the proportions of it are, conſequently, according to the proportions of right of property. Now the property is here held between the parties in four lots, three of which appertain to the proprietor of the ſtock, and one to the manager; becauſe, upon the capital being reſolved into one ſpecific article, the profit (namely, one thouſand *dirms*) becomes evident; and that is between the two in equal ſhares; and one thouſand (the original capital) appertains to the proprietor of the ſtock, as the value of the ſlave is *two* thouſand. Upon each party paying his proportion of the atonement, the ſlave becomes excluded from the *Mozáribat* ſtock:—the manager's ſhare in him; becauſe, in the preſent inſtance, his reſponſibility with reſpect to that ſhare operates upon him, and hence that ſhare is no longer as a *depoſit* with him; and *Mozáribat* ſtock is a depoſit, as was formerly explained:—and the proprietor's ſhare, becauſe, upon the magiſtrate decreeing the atonement to be divided between both, the ſlave alſo becomes divided between them; and a contract of *Mozáribat* is diſſolved by a participation in the ſtock.—It is otherwiſe in the caſe exemplified in the beginning of this ſection, (where two thouſand *dirms* periſh in the manager's hands,) for there the three fourths which form the ſhare of the proprietor of the ſtock do not become excluded from the *Mozáribat* contract.—The difference between that caſe and the caſe now under conſideration, exiſts in three ſhapes. I. In the former caſe the reſponſibility of *traffic* only is incumbent; and reſponſibility of traffic is not repugnant to *Mozáribat*, ſince *Mozâribat* itſelf is a branch of traffic;—whereas, in the caſe in queſtion, reſponſibility for *offence* is incumbent; and reſponſibility for offence is not a branch of traffic.—II. In the former caſe, the whole price is incumbent upon the manager, although he have a right to revert upon the proprietor of the ſtock;—in that inſtance, therefore, there is no neceſſity for diviſion.—III. The ſlave, in the inſtance of offence, eſcapes, as it were, from the property of both parties, in conſequence of his offence, and their paying an atonement for him is, as it were, a purchaſe of him *de novo*.—He, therefore, no longer appertains to the *Mozáribat*

---

* See ſales of *profit*.

zâribat ſtock, but is held between the parties in four lots, performing ſervice to the manager one day, and to the ſtock-proprietor three days, alternately:—contrary to the *former* caſe.

The manager bargaining for an article, and then loſing the ſtock, muſt have recourſe to his employer for another ſtock, to enable him to fulfil his engagement.

If a manager be poſſeſſed of a thouſand *dirms*, and therewith purchaſe a ſlave, but neglect paying the price to the ſeller, and the thouſand *dirms* periſh in his hands, the proprietor of the ſtock muſt, in this caſe, make over another thouſand to the manager, and the *Mozâribat* ſtock is then two thouſand *dirms*.—The reaſon of this is, that as the ſtock is merely a *depoſit* with the manager, he therefore cannot be conſidered as having duly received the price in virtue of his ſeizin [of the one thouſand *dirms*,] ſince a receipt in virtue of ſeizin is not eſtabliſhed unleſs it involve reſponſibility.—Now as a due receipt of the price, by the manager, is not eſtabliſhed, it follows that he is entitled, even *repeatedly*, to take the price from the ſtock-proprietor; that is to ſay, if he take the price from the proprietor, and it be again loſt in his hand, he may again take the price from him; and ſo on, repeatedly, until the ſeller's demand be ſatisfied;—and the whole of what the proprietor thus makes over to the manager becomes ſtock.—It is otherwiſe in the caſe of an agent commiſſioned to purchaſe a ſpecific ſlave for one thouſand ſpecific *dirms*,—where the conſtituent delivers the price to the agent *before* the purchaſe, and they are loſt in his hands *after* the purchaſe; for in this caſe the agent cannot take the price from his conſtituent more than once, ſince it is poſſible to conſider him as having already made a due receipt of the price from his conſtituent; for agency is not repugnant to reſponſibility, but is rather involved with it;—as where, for inſtance, an uſurper is commiſſioned by the proprietor to ſell the thing he has uſurped.—It is to be obſerved that, in the caſe of agency, as here adduced, the agent reverts to his conſtituent only *once*.—If, however, the agent were firſt to make the purchaſe, and *then* to receive the price from his conſtituent, he cannot afterwards revert to him at all; becauſe, as the agent becomes endowed with a right to call upon his conſtituent on the inſtant of the purchaſe, it follows that his ſeizin of the price, after that was due, is a complete receipt on his part:—he is therefore conſidered as having duly received the price, in virtue of his ſeizin of it after the purchaſe:—on the contrary, what the conſtituent makes over to the agent *before* the purchaſe is merely a *depoſit* in his hands; and *after* the purchaſe it ſtill remains a depoſit with him, ſince, in this inſtance, no cauſe of reſponſibility appears even *after* the purchaſe.—The agent, therefore, in this caſe, is not conſidered as having duly received the price; and conſequently, upon that being loſt in his hands, he may take it again from the purchaſer:—but if, again, it be loſt in his hands, he cannot again revert upon the purchaſer, ſince here a due receipt has been eſtabliſhed, as before explained.

CHAP. V.

Of Diſputes between the Proprietor of the Stock, and the Manager.

In diſputes reſpecting the acquiſition of profit upon the exiſting ſtock, the aſ-

IF the manager have two thouſand *dirms* in his hands, and ſay to the ſtock-proprietor, "you entruſted me with *one* thouſand, and one "thouſand has accrued as profit," and the proprietor reply, "I entruſted you with *two* thouſand,"—the aſſertion of the *manager* is to be ſertion of the manager is to be credited:

be credited.—*Haneeſa* was at firſt of opinion that the aſſertion of the *proprietor* ſhould be regarded; and ſuch is the doctrine of *Ziffer*;—becauſe the manager here appears as a plaintiff, claiming a partnerſhip in the profit,—and the proprietor as a defendant, denying his claim; and the aſſertion of the defendant is to be credited.—*Haneeſa*, however, afterwards retracted this opinion, and admitted that the aſſertion of the manager muſt be credited; becauſe the diſpute here turns upon the amount received; and concerning that the aſſertion of the *receiver* muſt be credited, whether he be merely a truſtee, or otherwiſe, ſince he beſt knows what he has received.—If the parties diſpute, not only concerning the amount of the ſtock, but alſo concerning the proportion of the profit,—the manager affirming it to be between them in equal ſhares, and the proprietor aſſerting it to be in three lots, two for himſelf and one for the manager, the aſſertion of the *proprietor* is to be credited; becauſe the manager here claims profit in virtue of a condition, which condition operates to the prejudice of the proprietor: his aſſertion, therefore, is to be credited.—But if either of the two produce evidence, his declaration muſt be admitted, as evidence is poſitive proof.

but in diſputes concerning the *proportions* of profit, that of the *proprietor*;

as alſo, in diſputes concerning the nature of the agreement under which the ſtock was entruſted to the manager.

If a perſon, having one thouſand *dirms* in his hand, ſay "ſuch "a perſon entruſted me with theſe in the way of *Mozáribat*, under "a condition of half the profit,"—and the perſon alluded to ſay "I gave him the one thouſand *dirms* as *Bazât*," the declaration of the proprietor is to be credited; becauſe the manager is plaintiff in this inſtance, ſince he either claims from the proprietor a recompence for his ſervice, or alleges a condition to his prejudice, or a partnerſhip in the profit,—all of which the proprietor denies.

If a perſon, having in his hands one thouſand *dirms*, the property of another, aſſert that "thoſe thouſand had been *lent* to

" him by that other," and the other aſſert that " he entruſted him " with them in the manner of *Bazât*, *depoſit*, or *Mozâribat*," the aſſertion of the *proprietor* is to be credited on the one hand, or evidence adduced by the perſon in queſtion on the other;—becauſe he aſſerts his having obtained poſſeſſion of the ſum in diſpute, by a *loan*; which the proprietor denies.

If the proprietor aſſert a reſtriction, the denial of the *manager* is credited:

IF the proprietor of the ſtock advance an allegation, againſt the manager, of reſtriction to one mode of traffic, affirming, for inſtance, that " he had directed him to trade in *cloth*, and in no other article,"—the aſſertion of the *manager*, upon oath, muſt be credited,—for, as *univerſality* is the original thing in a contract of *Mozâribat*, and reſtriction cannot be impoſed in it but by particular ſtipulation, it follows that the aſſertion of the party who reſts upon the *original* thing muſt be credited. It is otherwiſe in agency, for in that *reſtriction* is the original thing.

but if each allege a different reſtriction, the allegation of the *proprietor* is credited.

IF the proprietor allege a reſtriction to *one* particular mode of traffic, and the manager allege a reſtriction to *another* particular mode, the aſſertion of the proprietor muſt be credited; for here both parties agree in the contract being reſtricted, and the proprietor's admiſſion, in this particular, is pleaded againſt him.—His aſſertion, therefore, is to be credited on the one hand; or evidence adduced by the manager, on the other;—for the manager ſtands in need of evidence to diſprove his reſponſibility; but the proprietor does not ſtand in need of evidence.

In diſputes concerning reſtriction to time, the evidence which proves the lateſt date is preferred.

IF the proprietor allege a reſtriction in point of time, and produce evidence thereto, and the manager allege a reſtriction to *another* time, and produce evidence thereto,—the proprietor, on his part, aſſerting that " he entruſted him [the manager] with one " thouſand *dirms*, in the manner of *Mozâribat*, for the purpoſe of " purchaſing wheat in the month of *Ramzân*,"—(producing evidence in ſupport of his allegation,)—and the manager, that "he "[the proprietor] gave him one thouſand *dirms* for the purpoſe of "purchaſing wheat in the month of *Shawál*," (producing evidence in ſupport of his allegation,)—the evidence which tends to prove the lateſt date muſt be preferred; becauſe the condition *laſt* ſtipulated annuls the condition *firſt* ſtipulated.

HEDÂYA.

BOOK XXVIII.

Of WIDDA, or DEPOSITS.

Definition of the terms uſed in depoſit.

WIDDA, in the language of the LAW, ſignifies a perſon empowering another to keep his property.—The proprietor of the thing is ſtiled *Modee*, or the *depoſitor*;—the perſon ſo empowered the *Modá*, or *truſtee*;—and the property ſo left with another, for the purpoſe of keeping it, is ſtiled *Widdeeyat*, becauſe *Widda* literally means *to leave*, and the thing in queſtion is *left* with the *Modá* or truſtee.

A truſtee is not reſponſible for a depoſit unleſs he tranſgreſs with reſpect to it.

A DEPOSIT remains in the hands of the perſon who receives charge of it, as a truſt,—that is to ſay, he is not anſwerable for it. If, therefore, a depoſit be loſt or deſtroyed in the truſtee's hands, without any tranſgreſſion on his part, he is not in that caſe reſponſible for it; becauſe the prophet has ſaid "*an honeſt truſtee is not reſponſible*;—and alſo, becauſe there is a neceſſity, amongſt mankind, for depoſits; and this neceſſity could not be anſwered in caſe of making truſtees reſponſible, as no one would then accept the truſt.

He may keep it himſelf, or commit the care of it to any of his family;

but if he give charge of it to a ſtranger he becomes reſponſible;

A TRUSTEE may either keep the depoſit himſelf, or commit it for that purpoſe to ſome one of his family, ſuch as his wife, his ſon, his mother, or his father; becauſe it is evident that a truſtee does not engage to keep the property of another with more care than he does his own; and he ſometimes keeps his own himſelf, and ſometimes commits it to one of his family. Beſides, there exiſts an abſolute neceſſity for committing the truſt to his family, ſince it is neither poſſible for him to remain always in the houſe, nor, when he goes out, to carry the depoſit with him.—For all thoſe reaſons, therefore, the conſent of the proprietor is underſtood to extend to the truſtee's committing the depoſit to the care of his family.—But if the truſtee ſhould commit the depoſit to the charge of any other than a member of his family, (as if he were either to hire ſome perſon *out* of his family, for the purpoſe of keeping it,—or to give it in depoſit to ſome one out of his family,) he is then reſponſible, in as much as there is a difference between the care of different people, and it was *his own* care, and not that of *another*, to which the proprietor aſſented. Beſides, a thing does not involve its ſimilar; and hence a truſtee is not empowered to conſtitute another the truſtee of the ſame thing; in the ſame manner as an agent is not permitted to conſtitute another agent. (By the term *family*, in this place, is to be underſtood all ſuch as live with the truſtee, or whoſe maintenance is incumbent upon him, or his upon them, as a *wife* or adult *ſon*.)

Digitized by Google

If a truſtee lodge the depoſit in a place of cuſtody* belonging to another, he becomes reſponſible for it; becauſe the lodging it in *another*'s place of cuſtody is, in effect, depoſiting it with that other.—It is otherwiſe, however, if he *hire* the ſaid place; for in that inſtance his lodging it there is conſidered in the ſame light with his keeping it himſelf, and therefore does not induce reſponſibility.

and ſo alſo, if he lodge it in a place of cuſtody belonging to another.

If the houſe of a truſtee take fire, and he deliver the depoſit to his neighbour,—or if, being in a boat on the point of ſinking, he throw the depoſit into another boat,—and it in either caſe be loſt, he is not reſponſible, ſince he acted only for the preſervation of it, and conſequently according to the conſent of the proprietor. But the aſſertion of the truſtee, in ſuch caſes, is not to be credited unleſs ſupported by witneſſes, ſince, upon the eſtabliſhment of a cauſe of reſponſibility, he pleads the exiſtence of a neceſſity, which invalidates the reſponſibility, and the caſe is therefore the ſame as if he were to plead that the proprietor had empowered him to conſign the depoſit to another.

He is not made reſponſible by putting it out of his own poſſeſſion with a view to the immediate preſervation of it.

If the proprietor of the depoſit demand it from the truſtee, and he neglect delivering it to him, being at the ſame time capable of ſuch delivery, he becomes in that caſe reſponſible for it, ſince his neglecting or refuſing to deliver it, under a capacity to do ſo, is a tranſgreſſion.—The ground of this is, that the demand of the proprietor clearly indicates his diſſent from the truſtee's retaining poſſeſſion any longer, and is therefore a diſmiſſion of him from the truſt.—Hence the truſtee is reſponſible, becauſe of his retaining poſſeſſion after ſuch diſſent.

He becomes reſponſible on neglecting to deliver it on demand.

If the truſtee mix the depoſit with his own property, in ſuch a manner that a ſeparation becomes difficult, he muſt in that caſe make

If he mix it inſeparably with his own

---

* Arab. *Makân Mohirrez*; meaning a cheſt, or other place of ſecurity. (See *Hirz.*)

property, he muſt make the proprietor a compenſation.

an adequate compenſation, and the proprietor (according to *Haneefa*) has not the option of ſharing the mixed property, whether the mixture be of a *homogeneous* nature, (ſuch as milk with milk, wheat with wheat, or white *dirms* with white *dirms*,) or of a *heterogeneous* nature, (ſuch as oil of ſeſamé with oil of olives, or wheat with barley.) The two diſciples allege that where the mixture is of homogeneous articles not of a *liquid* nature, (ſuch as white *dirms* with white *dirms*, or *wheat* with *wheat*,) the proprietor of the depoſit has the option either of becoming a ſharer with the truſtee, or of taking a compenſation for the value; becauſe although it be impoſſible, in ſuch a caſe, for the proprietor to receive his right with reſpect to *appearance*, ſtill it is poſſible for him to receive it with reſpect to *reality*, (that is, in *effect*,) by making a diviſion, ſince, in all articles of weight, or meaſurement of capacity, a delivery by *diviſion* is equivalent to a delivery of the actual article, according to all authorities.—Such, therefore, being the caſe, it appears that *mixture*, in the inſtance in queſtion, is a deſtruction in one reſpect, but not a deſtruction in another reſpect; and conſequently, that the proprietor of the article placed in depoſit has the option either of taking a compenſation on the principle of the mixture being a *deſtruction*, or of becoming a ſharer (if he pleaſe) on the principle of its *not* being a deſtruction.—The argument of *Haneefa* is that mixture is in every reſpect a deſtruction, becauſe of its being an action which occaſions an impoſſibility of returning the thing to the proprietor in its original ſubſtance.—In regard to what the two diſciples advance, that "it is poſſible for the proprietor to receive his "right with reſpect to *reality*, by means of a diviſion," it is anſwered that the proprietor cannot attain his *actual right* by means of diviſion. Beſides, diviſion has been inſtituted from neceſſity, merely as a mode of advantage in caſes of partnerſhip. Diviſion, therefore, is merely an *effect* of partnerſhip, and is incapable of being a *cauſe* of it, for otherwiſe the principal would become ſecondary, and the ſecondary principal.—The reſult of this diſagreement is that if the proprietor ſhould exempt the truſtee, where he makes the mixture, by ſaying to him " I exempt you from the compenſation due by you on account of the mixture," in that caſe, according to *Haneefa,* his right becomes entirely cancelled, ſince (agreeably to his tenets) the proprietor's right is limited to the compenſation, which he expreſsly foregoes;—whereas, according to the two diſciples, the proprietor's right of option to a compenſation ceaſes in conſequence of ſuch exemption, and reſolves itſelf into a ſhare in the mixed property; becauſe although, by the exemption, his *right of option* be deſtroyed, ſtill his *actual property* is not deſtroyed.—It is to be obſerved that the mixture of one liquid with a different liquid (ſuch as of oil of *Seſame* with oil of *olives*) deſtroys the right of the proprietor to a participation in the mixed property, and fixes and determines it to a compenſation, according to all our doctors, as ſuch a mixture is a deſtruction with reſpect both to appearance and reality, ſince a diviſion is in this inſtance impracticable, becauſe of the difference of ſpecies.—Of the ſame claſs, according to the *Rawâyet Saheeh,* are all caſes of an admixture of different articles, *not* liquids, where the ſeparation is difficult, as in the mixture of *wheat* with *barley*.—In caſes where the ſeparation requires a proceſs, or is attended with ſome difficulty, (ſuch as if *dirms* ſhould be melted and incorporated with others,) the depoſitor's right to the ſubſtance ceaſes, and he is entitled to a compenſation, according to *Haneefa,* as before ſtated. *Aboo Yooſaf* holds that in this caſe the ſmaller is ſubordinate to the greater, (for, according to his tenets, *ſuperiority* muſt be regarded,) and that, therefore, the perſon who poſſeſſed the largeſt ſhare of the property becomes proprietor of the whole, and liable to compenſate to the other for the value of his quantum.—*Mohammed,* on the other hand, maintains that the proprietor of the depoſit becomes a participator with the other in either caſe, becauſe, according to his tenets, ſpecies cannot acquire a ſuperiority over the ſame ſpecies, as has been already explained in treating of foſterage.

If a depoſit be mixed with the property of the truſtee, not by any act of the latter, but by accident, (as if a bag containing the depoſit

If the mixture be occaſioned by accident, the proprietor becomes a proportionate ſharer in the whole.

poſit, and another containing property of the truſtee, ſhould both be torn, and the contents mingled together,) in that caſe the truſtee becomes a ſharer in the property with the depoſitor, and is not reſponſible for a compenſation, ſince he did not commit any act inducing reſponſibility.—They therefore become partners in the whole, according to all our doctors.

If the truſtee expend a part, and ſupply the deficiency, by mixture, from his own property, he is reſponſible for the whole.

If a truſtee expend part of the depoſit, and then produce a ſimilar to what he had expended, and mix it with the remaining part, in ſuch a manner that a ſeparation is difficult, he is, in that caſe, reſponſible for the *whole* of the depoſit; becauſe the part expended is a debt due by him, which he cannot otherwiſe diſcharge than in the preſence of the owner.—When, therefore, he mixes his own property with the remainder of the depoſit, he in fact deſtroys that remainder; as was before explained.

In caſes of tranſgreſſion with reſpect to the depoſit, the truſtee is reſponſible ſo long as the tranſgreſſion continues.

If a truſtee tranſgreſs with reſpect to the depoſit, by converting it to his own uſe, (as if, being a quadruped, he ſhould ride upon it,—or, being a gown, he ſhould wear it,—or, being a ſlave, he ſhould uſe his ſervices,)—or by committing it to the care of a ſtranger, and he afterwards refrain from the uſe of it, or receive it back from the ſtranger, his reſponſibility thereupon ceaſes. *Shafei* maintains that he does not become exempted from reſponſibility; becauſe the contract of depoſit ceaſes and determines immediately on the exiſtence of reſponſibility, ſince *reſponſibility* and *depoſit* are irreconcileable:—the truſtee, therefore, in ſuch caſe, cannot be exempted until he make actual reſtitution to the proprietor. The argument of our doctors is, that the order of the depoſitor to preſerve the property continued to operate, as it was abſolute, and not reſtricted to any particular time; it being underſtood, in this caſe, that the proprietor had generally deſired him to preſerve the property, without reſtricting ſuch deſire to any particular time.—As, therefore, the order is ſtill in force, it follows that the truſtee, after abſtaining from the tranſgreſſion, becomes again truſtee, becauſe the object of the contract was

preſervation

Digitized by Google

preſervation.—The contract, moreover, was ſuſpended in its effect merely from the neceſſity of eſtabliſhing a breach of it: when, therefore, the breach is removed, the contract becomes revived in its effect; in the ſame manner as where a perſon hires another to guard his property for a month, and the perſon ſo hired remits his guard for part of the month, in which caſe he is entitled to wages in proportion to the number of days he did watch.—In anſwer to *Shafeï*'s aſſertion, that "the truſtee cannot be exempted from reſponſibility until he "make actual reſtitution to the proprietor," it is to be obſerved that, as the original order ſtill continues in force, and the truſtee ceaſes from his tranſgreſſion, a recovery of the depoſit is obtained into the poſſeſſion of the truſtee, who is the ſubſtitute or confidant of the proprietor; and as this recovery is equivalent to a reſtitution of it to the proprietor himſelf, he [the truſtee] is conſequently not reſponſible for it on the ground of deſtruction.

If the truſtee deny the depoſit, upon demand, he is reſponſible in caſe of the loſs of it:

If the proprietor of the depoſit demand it of the truſtee, and the truſtee deny the depoſit, and it be afterwards loſt, the truſtee is in that caſe reſponſible; becauſe, as the depoſitor, in making the demand, diſmiſſes the truſtee from his charge, it follows that the truſtee, in retaining the depoſit after ſuch demand, is an uſurper, and is conſequently reſponſible.—If, alſo, after the denial, the truſtee ſhould acknowledge the depoſit, ſtill he does not thereby become exempted from reſponſibility, becauſe the contract had been previouſly done away, in as much as the demand of reſtitution by the depoſitor was a diſſolution on his part, and the denial of the depoſit was a diſſolution on the part of the truſtee; in the ſame manner as the denial of agency by the agent, or of ſale either by the buyer or ſeller, is a diſſolution on their part.—Now when a diſſolution takes place on both ſides, the contract to which it relates is done away, and cannot afterwards be revived, unleſs by a new formation, which does not appear in the caſe in queſtion.—In this caſe, therefore, a recovery into the poſſeſſion of the proprietor's ſubſtitute cannot be underſtood.—It is other-

Digitized by Google

wiſe where the truſtee deviates from his inſtructions by tranſgreſſing upon the property, and afterwards ceaſes from ſuch deviation, and conforms to his orders, for in this caſe a recovery appears into the the poſſeſſion of the proprietor's ſubſtitute, as was before explained.

but not if the denial be made to a ſtranger.

If the truſtee deny the depoſit to ſome *other* than the proprietor, he is not reſponſible, according to *Aboo Yooſaf*, (contrary to the opinion of *Ziffer*,) becauſe denial to any other than the proprietor may be for the ſake of preſervation. The truſtee, moreover, is not competent to his own diſmiſſion, unleſs in the preſence of the depoſitor, or unleſs the depoſitor claim his property from him. The order for keeping the property, therefore, ſtill continues in force:—contrary to where the denial is made to the *depoſitor*.

A truſtee is at liberty to carry the depoſit with him upon a journey,

A TRUSTEE is at liberty, according to *Haneefa*, to carry the depoſit with him when he travels, although carriage and other expences be thereby incurred.—The two diſciples maintain that this is not permitted to him where carriage or other expence is incurred. *Shafeï*, on the other hand, maintains that it is not allowable in either caſe, becauſe he conſiders an order to *keep* the article in the common acceptation of *keeping*, namely, keeping in *cities*; in the ſame manner as where a perſon hires another for the preſervation of his goods for a ſtated time, in which caſe the perſon hired is not at liberty to travel with the goods,—or, if he ſhould do ſo, becomes reſponſible for them. The argument of *Haneefa* is, that the proprietor's commiſſion for preſervation is abſolute and unconfined; and that a *plain* is a place of preſervation, provided the road be ſecured; on which principle it is permitted to a father or guardian to travel with the property of their ward. The reaſoning of the two diſciples is that, in caſe of travelling, where carriage for the depoſit is neceſſary, the expence of it muſt fall on the depoſitor; and as it is probable he may not aſſent to this, his commiſſion for keeping the article muſt, in ſuch a caſe, be conſidered

Digitized by Google

as limited to a city.—The anſwer to this is that the circumſtance of the expence of removal falling upon the proprietor is of no moment, as it may be a conſequence of an attention to the preſervation of his property, and the fulfilment of his commiſſion.—The anſwer to *Shafeï* is that although all articles chiefly abound in *cities*, ſtill the *keeping* or *preſerving* of them is not particularly confined to *cities*, but extends alike to cities and to plains; ſince the inhabitants of plains muſt neceſſarily *keep* their property in plains.—Beſides, a removal of the depoſit may ſometimes be a deſirable object to the proprietor; as where it is made from a city in danger to one in ſecurity; or to the particular city in which the proprietor dwells.—Now as the *keeping* of an article is not, in its common acceptation, limited to cities, it follows that a commiſſion for keeping is not limited to any particular city. It is otherwiſe in a caſe of *hire* for keeping, as hire is a contract of exchange, which requires a delivery of the ſubject of the contract (namely, *keeping* or *guarding*) in the place where the contract is executed.—It is to be obſerved that this caſe proceeds on a ſuppoſition of the contract being abſolute, the road which the truſtee travels ſafe, and the journey neceſſary: for, if the road be dangerous, or the journey not neceſſary, the truſtee is reſponſible, according to all our doctors.—If, alſo, the journey be not neceſſary, and the truſtee travel with all his family, he is not reſponſible: but if, the journey not being neceſſary, he ſhould leave his family behind, he becomes reſponſible, as in that caſe it was his duty to have left the depoſit with his family.

(provided the contract be abſolute, the road ſafe, and the journey neceſſary.)

If the proprietor expreſsly prohibit the truſtee from carrying the depoſit out of the city, and he nevertheleſs carry it out, he becomes in that caſe reſponſible for it, as the reſtriction ſo impoſed is a valid one, ſince keeping the article in a *city* is moſt eligible.

unleſs this be expreſsly prohibited.

If two men depoſit ſomething jointly with another, and one of them afterwards appear, and demand his ſhare of the depoſit, the truſtee

In caſe of a depoſit by two perſons, the truſtee cannot deliver to either his ſhare, but in preſence of the other.

tee muſt not give it, unleſs in the preſence of the other depoſitor, according to *Haneefa*. The two diſciples maintain that the truſtee muſt deliver the claimant his ſhare;—and the ſame is alſo ſaid in *Kadooree*'s compendium. In the *Jama Sagheer* it is ſaid that if three men depoſit one thouſand *dirms* with a particular perſon, and two of them afterwards diſappear, the third is not entitled to take his ſhare, according to *Haneefa:* but according to the two diſciples he is entitled to take it. (It is to be obſerved that this difference of opinion relates ſolely to articles of weight, or meaſurement of capacity.) The argument of the two diſciples is that the depoſitor claims his own ſhare only, and is therefore entitled to receive it, where it is attainable, in the ſame manner as a copartner in a debt. The argument of *Haneefa* is that the perſon preſent, in claiming his own ſhare, neceſſarily claims half of the abſentee's, ſince he claims a ſeparate and determinate portion, whereas his right is indefinite. Now where a right is mixed indefinitely with another, it is to be rendered ſeparate and determinate only by means of diviſion; but the truſtee has no power to make a diviſion; and accordingly, if he were to give the preſent claimant his ſhare, it is not accounted a diviſion by any of our doctors.—It is otherwiſe in a caſe of a participated debt, becauſe, in that inſtance, the preſent creditor claims from the debtor a delivery of his right, which may be made without a diviſion, ſince debt is diſcharged by means of ſimilars.—With reſpect to what is advanced by the two diſciples that "the depoſitor is entitled to receive his ſhare where it is attainable," it may be anſwered, that it does not from thence follow that the truſtee is liable to any *compulſion* on that head:—in the ſame manner as where, for inſtance, a perſon depoſits one thouſand *dirms* with another, who is indebted in one thouſand *dirms* to a third perſon; in which caſe, although it be lawful for the creditor to take his due wherever it be attainable, ſtill it is not lawful for the truſtee to pay him with the ſaid depoſit.

Two perſons, receiving a diviſible article in truſt, muſt each keep an half.

If a perſon depoſit, with two men, an article capable of diviſion, it is not lawful for either of theſe truſtees to commit ſuch article entirely to the other, but they muſt divide it, and retain each an half; whereas, if the article were incapable of diviſion, either might lawfully keep it entirely with the conſent of the other.—This is the doctrine of *Haneefa*; and ſuch alſo is the law, according to him, in a caſe of two pawnees, to whom a thing incapable of a diviſion is jointly pledged; for in that caſe either of them, with the conſent of the other, may retain ſole poſſeſſion of it;—and ſo likewiſe, in the caſe of two agents empowered to buy any thing, and entruſted jointly with the purchaſe-money; for in that caſe, alſo, one of the parties may retain the whole of the money with the conſent of the other.—The two diſciples allege that it is lawful for one of the parties to take entire charge, with the conſent of the other, in either caſe; for as the proprietor has manifeſted his confidence in the integrity of both, it is therefore lawful for either to deliver the depoſit to the other without being reſponſible, in the ſame manner as where the depoſit is incapable of diviſion.—The argument of *Haneefa* is, that the proprietor has given his approbation to the charge being united in *two*, but not to its being veſted entirely in *one*; becauſe the act of keeping, where it relates to a *diviſible* article, applies only to a *part* of the article, not to the *whole*.—The delivery, therefore, of the whole by either party to the other is without the proprietor's conſent; and the party who makes ſuch delivery is accordingly reſponſible.—But the receiver is not reſponſible, ſince (according to his tenets) the truſtee of a truſtee is not ſubject to reſponſibility. It is otherwiſe where the depoſit is incapable of diviſion; for where an article of that nature is depoſited with two perſons, it is impoſſible for them jointly to be concerned in the care of it every hour of the day and night, unleſs by turns; and the approbation of the proprietor, with reſpect to the whole, is therefore of neceſſity conſtrued to extend to either of them in particular.

Reſtrictions are not regarded where they are repugnant to cuſtom or convenience;

If the proprietor of a depoſit ſay to the truſtee "deliver "not the depoſit to your wife," and he nevertheleſs deliver it to his wife, he becomes in that caſe reſponſible.—It is recorded, in the *Jama Sagheer*, that if the proprietor prohibit the truſtee from delivering the depoſit to any one of his family, and he nevertheleſs deliver it to one of his family from any unavoidable neceſſity, he is not made reſponſible by having ſo delivered it;—as if, for inſtance, the depoſit be an animal, and the proprietor prohibit the truſtee from giving charge of it to his ſlave;—or as if, being of the deſcription of things uſually committed to the care of women, he ſhould prohibit him from delivering it to any of his wives. The compiler of the *Hedáya* remarks, that as the former of theſe reports is abſolute, and that quoted from the *Jama Sagheer* reſtricted, the firſt ought alſo to be underſtood as reſtricted; for this reaſon, that it is impoſſible to manage the conſervation with an obſervance of the condition, which is therefore nugatory.—But if the truſtee ſhould not act from neceſſity,—as if, having two wives, or two ſlaves, the proprietor ſhould prohibit the delivery to one particular wife, or to one particular ſlave, and the truſtee nevertheleſs commit the depoſit to the particular wife or ſlave ſo prohibited,—he becomes reſponſible, ſince the condition in this caſe is uſeful, as ſome of the family may not be truſtworthy; and, as the conſervation of the depoſit is not incompatible with the obſervance of the condition, it is therefore valid.

or where they relate to the particular apartment in a houſe.

If the proprietor ſay to the truſtee, "Keep the depoſit in this "apartment of this *Serai*," and he keep it in another apartment of the ſame *Serai*, in that caſe he is not reſponſible for it; becauſe the condition was uſeleſs, in as much as there is no difference with reſpect to keeping in different apartments of the ſame *Serai*.—(If, on the contrary, he were to keep it in a different *Serai*, he is reſponſible; becauſe, as a difference of *Serais* occaſions a difference in the keeping, the condition is therefore of uſe, and the reſtriction is conſequently valid.)—If, however, there be an evident difference between two different

Digitized by Google

ferent apartments of the ſame *Serai*, (as if, the *Serai* being extenſive, the apartment prohibited ſhould be full of holes and crevices,) the condition ſo made is valid, and the truſtee becomes reſponſible in caſe of preſerving it in that apartment.

Where the depoſit is transferred to a *ſecond* truſtee, and loſt, the proprietor receives his compenſation from the original truſtee.

If a perſon depoſit ſomething with another, and that other again depoſit it with a third perſon, and it be loſt in this perſon's hands, in that caſe the proprietor of the depoſit, according to *Haneefa*, muſt take a compenſation from the firſt truſtee, not from the ſecond. The two diſciples allege that the proprietor is at liberty to take the compenſation either from the firſt or ſecond truſtee; and that, in caſe he ſhould take it from the firſt, he [the firſt] is not empowered to take an indemnification from the ſecond; but that, in caſe of his taking it from the ſecond, the ſecond is then entitled to take an indemnification from the firſt.—The reaſoning of the two diſciples is that the ſecond truſtee has received the depoſit from the hands of a perſon who has himſelf become reſponſible*, and is therefore reſponſible;—in the ſame manner as the truſtee of an uſurper;—that is to ſay, if an uſurper depoſit with any perſon the goods he has uſurped, and they be loſt in the truſtee's hands, the proprietor is at liberty to take a compenſation either from the uſurper or the truſtee; and ſo alſo in the caſe in queſtion.—The ground of this is, that the proprietor of the depoſit not having given his approbation to the *ſecond* depoſit, the firſt truſtee was guilty of a tranſgreſſion; and the ſecond truſtee was alſo guilty of a tranſgreſſion in having received it without the conſent of the proprietor.—The proprietor, therefore, has the option of taking a compenſation from either.—If, however, he take the compenſation from the *firſt* truſtee, he [the firſt truſtee] is not in that caſe entitled to indemnify himſelf from the ſecond; becauſe, upon paying the compenſation, he becomes proprietor, which conſtitutes the ſecond a legal truſtee; and a legal truſtee is not reſponſible for the depoſit.—If, on the contrary, the proprietor take the compenſation from the *ſecond* truſtee, he [the ſecond] is in that caſe entitled to an indemnification from the firſt; becauſe, as not being a legal truſtee, he muſt be conſidered merely as an agent for conſervation on behalf of the original truſtee; and as ſuch he is entitled to an indemnification for whatever loſſes he may ſuſtain, connected with the agency.—The reaſoning of *Haneefa* is, that the ſecond truſtee received the article from the hands of a *truſtee*, and not of a *reſponſible* perſon; becauſe the firſt truſtee does not become reſponſible until the thing be ſeparated from the ſecond truſtee; ſince ſo long as it is in exiſtence with him, the wiſdom and judgment of the firſt truſtee are conſidered to be, as it were, extant and at hand with regard to it.—The proprietor, moreover, is ſuppoſed aſſenting to any mode of keeping his property which may be agreeable to the truſtee's judgment; and as that ſtill continues to be exerted, it follows that no tranſgreſſion whatever has as yet taken place.—But, upon the article being loſt by the ſecond truſtee, the firſt truſtee is held to abandon the charge he had undertaken, and is therefore reſponſible.—The *ſecond* truſtee, on the other hand, continues in his original predicament; that is, his ſeizin is a ſeizin of truſt in the *end*, in the ſame manner as it was at the *beginning*; and as he is not found in any tranſgreſſion, he therefore is not reſponſible for the depoſit;—in the ſame manner as where the wind blows a gown near to any perſon, and it is afterwards deſtroyed, in which caſe that perſon is not reſponſible.

---

* In conſequence of the deviation from his truſt.

Caſe of claim advanced by two perſons to a ſum of money in the poſſeſſion of a third.

If two perſons ſhould ſeparately claim a thouſand *dirms* in the poſſeſſion of a third, each aſſerting that he had depoſited them with him, and the poſſeſſor deny their claims, but refuſe to take an oath to that effect, the thouſand *dirms* muſt, in that caſe, be divided between the two claimants, and the defendant remains anſwerable to them for one thouſand more.—The reaſon of this is, that the claim of each ſeveral claimant is valid, as the claim of each has the probability of truth.—Hence each is entitled to exact an oath from the defendant,

fendant, who, on his part, is required to make a ſeparate depoſition with reſpect to each, as the right of each is diſtinct. The *Kâzee*, in adminiſtering the oaths, may lawfully begin with either, ſince it is impoſſible to adminiſter both at the ſame time, and neither has ground of preference over the other.—If, however, a contention ſhould take place between the claimants on this point, the die muſt be thrown in order to ſatisfy them, and to remove any ſuſpicion of partiality on the part of the *Kâzee*.—If he then take an oath in denial of the claim of one, let another oath be adminiſtered to him in denial of the ſecond's claim; and if he thus make oath, denying the claims of both, nothing is due from him, for want of proof.—If he ſhould refuſe to take the ſecond oath, a decree muſt be paſſed in favour of the ſecond claimant, ſince the proof is eſtabliſhed.—If, on the contrary, he refuſe to take the *firſt* oath, a decree muſt not be paſſed in favour of the firſt claimant, but an oath muſt be tendered to him with regard to the claim of the ſecond.—It were otherwiſe if, at the time of refuſing, he were to make an acknowledgment in favour of the firſt; for in that caſe a decree would immediately paſs; ſince acknowledgment is proof and a cauſe of property in itſelf; whereas a refuſal to take an oath is neither proof, nor a cauſe of property, unleſs in conjunction with the decree of the *Kâzee*. It is therefore lawful for the *Kâzee*, in ſuch a caſe, to ſuſpend his decree until he ſhall have tendered the ſecond oath, that he may be apprized of the full extent to which his decree is to go:—and if the defendant refuſe to take the *ſecond* oath alſo, the *Kâzee* muſt then paſs a decree equally in favour of both; becauſe neither party has a ſuperiority over the other in point of proof; and no regard whatever is paid to priority of refuſal [to ſwear,] ſince the two refuſals do not conſtitute proof ſeparately, but together and at one period, namely, at the period of the decree of the *Kâzee*;—and as, if both had adduced evidence, no ſuperiority would have been given to either evidence on the ground of priority, ſo alſo in the preſent inſtance.—The defendant muſt alſo give a compenſation of another thouſand *dirms* to the claimants, ſince in paying them the *one* thouſand which was preſent he only pays each half his due.—Suppoſing that the *Kâzee*, in conſequence of a refuſal to take the firſt oath, ſhould immediately paſs a decree in favour of the firſt claimant, without waiting to tender an oath with reſpect to the claim of the other, in this caſe *Imâm Alee Yezàdee*, in his commentary upon the *Jama Sagheer*, ſays that an oath muſt be tendered with regard to the ſecond;—and if the defendant refuſe to take it, a decree muſt then be paſſed jointly, in favour of both claimants, in an equal degree; becauſe the decree in favour of the *firſt* claimant was not deſtructive of the right of the *ſecond*, ſince the precedence, in the adminiſtration of the oath, was determined either by the will of the *Kâzee*, or the chance of the die; and neither of theſe have power to deſtroy the ſecond's right.—*Khaſâf* has ſubſtituted a *ſlave* in this caſe; that is, inſtead of one thouſand *dirms*, he has ſuppoſed the diſpute to relate to a ſlave; and he maintains that the ſentence ought to be executed in favour of the firſt claimant, ſince the matter is uncertain, in as much as ſeveral of the learned have given it as their opinion, that a decree ſhould be paſſed in favour of the firſt without waiting for the ſecond, as a denial to take an oath is equivalent, by implication, to an acknowledgment.—He, moreover, remarks, that the oath with reſpect to the ſecond claimant muſt not be adminiſtered to this effect, "this ſlave is not the ſlave "of ſuch an one," becauſe a refuſal on the part of the defendant to take ſuch an oath is of no conſequence, after the ſlave in queſtion had been proved to be the property of another.—The tenor of the oath, therefore, muſt be "there is nothing due from me to this "man; not this ſlave, nor the value of him, (which is ſo much,) "nor *leſs* than the ſaid value."—He alſo obſerves, that it is requiſite this oath be adminiſtered, according to *Mohammed*; but not according to *Aboo Yooſaf*; becauſe if a truſtee ſhould make an acknowledgment of the depoſit in favour of a certain perſon, and the thing acknowledged ſhould by a decree of the *Kâzee* be given to another, then, according to *Mohammed*, the acknowledger is reſponſible, but not according to *Aboo Yooſaf*.—Now the caſe in queſtion is a branch of this caſe relative to the acknowledgment of a depoſit; and conſequently the law in the one caſe is the ſame as in the other.—The caſe of acknowledgment here alluded to, is where a perſon firſt acknowledges a particular ſlave to be the property of a particular perſon, and afterwards denies it, averring that another perſon had *depoſited* the ſlave with him, and a decree is paſſed in favour of the firſt acknowledgee, becauſe of the ſecond acknowledgment being a retractation of the firſt;—in which caſe, if he ſhould have given the ſlave to the firſt without a decree of the *Kâzee*, he is reſponſible, in the opinion of all our doctors; or if he ſhould have given the ſlave by the decree of the *Kâzee*, in that caſe alſo, according to *Mohammed*, he is reſponſible, becauſe he acknowledges his obligation to keep the ſlave on account of the ſecond, and yet he deſtroys the ſaid ſlave, (that is, ſo far as relates to the claim of the ſecond,) by means of his acknowledgment, and is conſequently reſponſible.—According to *Aboo Yooſaf* he is not reſponſible in this inſtance, becauſe, as he holds, it is not the immediate act of *acknowledgment* that deſtroys the ſlave, ſo far as relates to the right of the other, but the giving of him to the other, which is the neceſſary conſequence of the order of the *Kâzee*. *Mohammed*, on the other hand, maintains that it was he who urged the *Kâzee* to paſs that decree; whence he is reſponſible. Now the reaſon for aſſimilating the caſe in queſtion with this one is, that the acknowledgment in favour of the ſecond claimant, after the firſt had acquired a right to the thing, is uſeful to the ſecond claimant, in as much as (in the opinion of *Mohammed*) it induces a reſponſibility in his favour. Hence, in this caſe, it is requiſite, according to *Mohammed*, to adminiſter an oath to the ſecond claimant, notwithſtanding the ſlave have been proved to be the right of the firſt, becauſe the object from it is to obtain a refuſal to take the oath, which is equivalent to an acknowledgment; and an acknowledgement, even in that caſe, is uſeful, as it induces reſponſibility. According to *Aboo Yooſaf*, on the contrary, an oath is not to be adminiſtered; becauſe, in the ſame manner as the defendant is not made reſponſible by an acknowledgment, ſo neither is he by a refuſal to ſwear, and hence the tendering of an oath is uſeleſs.

HEDÂYA.

BOOK XXIX.

Of AREEAT, or LOANS.

Definition of *Areeat*, and the nature of the *uſe* granted in a loan.

AREEAT, according to our doctors, ſignifies an inveſtiture with the *uſe* of a thing without a return.—The perſon who ſo grants the uſe is termed *Moyeer*, or the *lender*; the perſon receiving it, *Mooſtayir*, or the *borrower*; and the article of which the uſe is granted, *Areeat*, or the *loan*.—*Koorokhee* and *Shafeï* define *Areeat* to ſignify, ſimply, *a licence to uſe the property of another*, becauſe it is ſettled by the word *Ibâbit*, ſignifying *licence* or *permiſſion*. Beſides, a ſpecification of the period is not a neceſſary condition in a loan: but if a loan were an *inveſtiture*, it would not be valid without ſuch ſpecification, ſince without a ſpecification of the period the full extent of the uſe cannot be aſcertained, and an inveſtiture with any thing unaſcertained

tained is invalid. A loan, moreover, is rendered null by a recall, whereas, if it were an *inveſtiture* with the uſe, it could not be rendered null by a recall, in the ſame manner as a *leaſe* cannot be annulled by a recall. Further, the borrower is not entitled to *hire* the loan; whereas, if it were an *inveſtiture*, he might let it out to hire, becauſe whoſoever is himſelf proprietor of a thing may conſtitute another proprietor of it. Our doctors, on the other hand, argue that the word *Areeat* indicates an *inveſtiture*, ſince it is derived from *Areeya*, which ſignifies a *grant*; and that, accordingly, in forming the contract the expreſſion *inveſtiture* is uſed. The *uſe* of a thing, moreover, is capable of being property, in the ſame manner as the actual thing itſelf; and as inveſtiture with the *latter* may take place either with or without a return, ſo alſo with reſpect to the *former*.—With reſpect to what *Koorokhee* urges concerning the term *Ibáhit*, it may be replied that this term is not uncommonly uſed to expreſs *inveſtiture*, ſince it is uſed in ſettling contracts of *leaſe*, which are an inveſtiture with reſpect to the uſe of the thing hired.—With reſpect to his concluſion, that "if a *loan* were an *inveſtiture* it would not be valid "without a ſpecification of its period, becauſe of uncertainty,"—it may be replied that uncertainty, in loans, is of no conſequence, as it cannot be productive of ſtrife, in as much as loans are not binding*, whence the uncertainty cannot be injurious. It is to be obſerved that a recall operates in a loan, becauſe a recall is a prohibition with reſpect to the enjoyment of the uſe, and after ſuch prohibition the uſe, of conſequence, ceaſes to be the property of the borrower. The borrower, moreover, is not competent to let out to hire the thing borrowed, ſince that is attended with an injury to the lender, as will be hereafter explained.—It is alſo to be obſerved that *inveſtiture* is made in four different ſhapes. I. By *ſale*, which is an inveſtiture with ſubſtance, for a return.—II. By *gift*, which is an inveſtiture with ſubſtance, without a return.—III. By *leaſe* or *hire*, which is an inveſtiture with the uſe of a thing for a return.—IV. By *loan*, which is an inveſtiture with the uſe of a thing without a return, as before explained; and which is lawful, as being a ſpecies of kindneſs; becauſe God has ſaid "DO KINDNESS TO EACH OTHER;" and alſo, becauſe the prophet borrowed a ſuit of armour from *Sifwan*.

---

* That is, may be retracted at pleaſure.

Forms under which it is granted.

A DEED of loan is rendered valid by the lender ſaying "I have *lent* you this," as there the purpoſe is expreſsly mentioned; or, by his ſaying "I have given you to eat of this earth," becauſe ſuch an expreſſion is uſed to denote a loan metaphorically; for as it is impoſſible to eat of the earth itſelf, the meaning is therefore conſtrued "to eat of the *produce* of it *."

The lender may reſume it at pleaſure.

THE lender is at liberty to reſume the loan whenever he pleaſes; becauſe the prophet has ſaid "MOONHA *is liable to be recalled, and a loan muſt be returned to the proprietor*; (*Moonha* is a ſpecies of loan, where a perſon lends another a goat, a cow, or a ſhe-camel, for inſtance,) that he may uſe their milk;—and alſo, becauſe the produce, or uſe of the thing lent, becomes property, particle by particle, merely according as it is brought into being; hence, with reſpect to ſuch part of the produce as is not yet brought into being, there is merely an *inveſtiture*, but no *ſeizin*: retractation with reſpect to ſuch part is therefore valid.

The borrower is not reſponſible for the loſs of it, unleſs he tranſgreſs reſpecting it.

A LOAN is a truſt. If, therefore, it be loſt in the hands of the borrower, without any tranſgreſſion on his part, he is not anſwerable for it, whether the loſs happen at the period of his uſing it, or otherwiſe.—*Shafeï* maintains that he is reſponſible for it in caſe the loſs ſhould take place at a time when he is not uſing it; becauſe he has taken poſſeſſion of the property of another without a right in it; and alſo, because as the borrower is liable to the charges of removal, in caſe of the

---

* Some caſes are here omitted, as they turn entirely upon different modes of expreſſion, in the original idiom.

Digitized by Google

the exiſtence of the ſubſtance, ſo alſo he is anſwerable for the value, in caſe of its deſtruction, in the ſame manner as an uſurper, the article ſtanding in the ſame predicament with merchandize detained with a view to purchaſe.—With reſpect to the *permiſſion* of ſeizin, eſtabliſhed on the borrower's behalf, that was granted merely with a view to enable him to enjoy the uſe; and hence, where the uſe ceaſes it no longer operates;—in other words, where the loan is deſtroyed during his enjoyment of the uſe, he is not reſponſible, becauſe of the exiſtence of the neceſſity; whereas, if it be loſt at a time when he is not uſing it, he is reſponſible, becauſe of the non-exiſtence of the neceſſity at that time. The argument of our doctors is, that the term *Arecat* does not indicate reſponſibility; for (according to *their* expoſition) it is an *inveſtiture* with the uſe without a return, or (according to *Shafeï* and *Koorokhee*) a *permiſſion* of the uſe; and the ſeizin of it is not a tranſgreſſion on the part of the borrower, ſince it was made with the conſent of the lender; and although that conſent was merely with a view to enable the lender to *uſe* the article, ſtill the borrower did not make the ſeizin with any *other* intention: he, therefore, is not guilty of any tranſgreſſion; and conſequently is not reſponſible.—In reply to what *Shafeï* urges it may be obſerved, that the expence attending a removal of the article is incumbent on the borrower, merely on account of the advantage he derives from it, in the ſame manner as the maintenance of a loan is incumbent upon the borrower, on account of the advantage he derives from it, and not on account of any defect in his tenure. It is otherwiſe in the caſe of an *uſurper*, where the charges of removal are due merely becauſe of the defect in his tenure.—With reſpect to ſeizin with a view to purchaſe, the reſponſibility in that inſtance does not ariſe from the ſeizin, but from the deſign with which it was made; for as ſeizin in virtue of a contract of ſale induces reſponſibility, ſo alſo ſeizin with an *intention* of purchaſe induces reſponſibility, ſince ſeizin with a view to any contract is ſubject to the ſame laws with that contract, as has been explained in its proper place.

It is not lawful for a borrower to let out a loan. If, therefore, he ſhould let it out, and it be afterwards loſt, he is in that caſe reſponſible for it; becauſe a loan is inferior to a leaſe, and an inferior cannot comprehend its ſuperior; and alſo, becauſe if the hire be valid, it can only be ſo on the ſuppoſition of its being binding; and that cannot be ſuppoſed otherwiſe than with the conſent of the lender; for if it were binding without his conſent, it would be a great injury to him, as it would deprive him of the power of reſuming the loan, until the expiration of the leaſe.—The leaſe of a loan is therefore invalid.—It is to be obſerved that, in caſe of letting out the loan, the borrower becomes reſponſible for it immediately upon the delivery to the leſſee; for as the act of lending does not comprehend *hire*, it follows that ſuch delivery is an uſurpation. The lender is in this caſe at liberty to take the compenſation, if he pleaſe, from the leſſee, becauſe of his having taken the property of another without his conſent. If, however, he take it from the borrower, he is not then entitled to any indemnification from the leſſee, ſince, in conſequence of his receiving a compenſation from the borrower, it becomes evident that the borrower only let his own property.—If he take the compenſation from the leſſee, the leſſee is in that caſe entitled to an indemnification from the borrower, who is the leſſor, provided he [the leſſee] had not known that the leaſe was a loan, as in that caſe he ſuffers an impoſition. It is otherwiſe where he takes the leaſe knowing it to be a loan, as there he ſuffers no impoſition.

He cannot let it out to hire: or, if he let it, he becomes reſponſible.

It is lawful for a borrower to lend the thing borrowed, provided it be of ſuch a nature as may not ſubject it to be differently affected by different uſes*.—*Shafei* is of opinion that the borrower is not entitled

He may lend it to another perſon, unleſs this ſubject it to be differently affected.

---

* Thus if the loan be a cow or a goat, as the object from theſe is milk, it matters not whether for this purpoſe they remain with *Zeyd* or *Omar*.—But if the loan be a riding-horſe, it may be of conſequence that *Zeyd* ſhould not lend it to *Omar*, for if *Zeyd* be thin and *Omar* fat, *Omar*'s uſe of the horſe would in that caſe affect it more than the uſe of it by *Zeyd*.

to lend the loan to another, becauſe (according to him) a loan is merely a *permiſſion of the uſe*, and a perſon to whom the uſe of a thing is permitted is not entitled to communicate that permiſſion to another, for this reaſon, that the uſe of a thing is not capable of being property, as it is a non-entity, the uſe being conſidered as an entity in the caſe of a leaſe merely from neceſſity, which in a loan may be compleatly anſwered by permiſſion.—Our doctors, on the other hand, argue that as a loan is an inveſtiture with the uſe of a thing, the borrower may therefore lend the loan, in the ſame manner as a perſon to whom the uſe of a thing devolved by bequeſt.—Beſides, in the ſame manner as the uſe is made property in the caſe of a *leaſe*, ſo alſo is it, from a principle of neceſſity, in the caſe of a *loan*.

OBJECTION.—If a *loan* ſignify an inveſtiture with the uſe, it would neceſſarily follow that the borrower is at liberty to lend the loan even where a difference of uſe may occaſion a different affection in the thing; whereas the law is otherwiſe.

REPLY.—It is not permitted to the borrower to lend the thing borrowed when of a nature to be differently affected by different uſe, becauſe of the poſſibility of the uſe of the ſecond borrower being more injurious to the thing than that of the firſt; and the conſent and approbation of the firſt lender is given to the uſe of the *firſt* borrower, but not to that of the *ſecond*.—The compiler of the *Hedáya* remarks that what is here related proceeds on the ſuppoſition of the loan being abſolute; for that loans are of four kinds. I. Loans that are abſolute with reſpect both to the period and the uſe; in which caſe the borrower is entitled to take the uſe in any manner and at any time he pleaſes, becauſe of the loan being abſolute.—II. Loans that are reſtricted both as to the uſe and the time, in which caſe the borrower is not allowed to depart from theſe reſtrictions, excepting where the deviation is in an inſtance that is ſimilar to the one preſcribed, or of a better kind; as where a perſon borrows a quadruped in order to load it on a particular day with ten meaſures of a particular kind of wheat; and he loads it on that day with ten meaſures of a different kind of wheat, or with leſs than ten meaſures of the ſame or a different kind of wheat.—III. Loans that are reſtricted in point of time, but abſolute with reſpect to the uſe;—and IV. Loans that are reſtricted with reſpect to the uſe, but abſolute with reſpect to time;—in either of which it is not lawful for the borrower to depart from the reſtrictions.—If, therefore, a perſon borrow a quadruped without any conditions whatever, he is in that caſe entitled either to load it on his own account, or to lend it to another for the purpoſe of lading, as in lading there is no difference; and, in the ſame manner, he may either ride upon it himſelf, or lend it to another for that purpoſe:—but as riding is ſuppoſed to be of different kinds, he is not entitled to more than one kind, which his own act muſt fix and determine; and hence, if he ſhould ride upon it himſelf, he is not afterwards at liberty to lend it to another to ride; or, if he ſhould lend it to another to ride upon, he is not afterwards entitled to ride upon it himſelf.

Loans of *money*, &c. as oppoſed to loans of ſpecific property.

The loan of *dirms* and *deenars*, and of articles eſtimated by *meaſurement of capacity*, by *weight*, or by *tale*, is conſidered in the light of *Karz* *.—The principle on which this proceeds is that *Areeat* is an inveſtiture with the uſe [of the property lent;] and as this cannot be obtained, with regard to theſe articles, without a deſtruction of the ſubſtance, it muſt, with reſpect to them, be neceſſarily conſidered as an inveſtiture with the ſubſtance.—Now an inveſtiture of this nature is to be conſidered in two lights,—a *gift* or a *loan* †:—the act is, however, regarded as a *loan* in this inſtance, either becauſe *loan* is more probable than *gift*, or becauſe the objects of a loan are twofold,—namely, the uſe of the article, and the reſtitution of the ſubſtance: and in the loan of the articles in queſtion, a reſtitution of an equivalent is admitted in place of the identical ſubſtance.—Lawyers, however, have obſerved that this doctrine proceeds on the ſuppoſition of the loan being abſolute: for if it be limited, (as if a perſon ſhould lend another a quantity of *dirms* merely to place in his ſhop and attract cuſtomers from the perſuaſion of his being rich,) it is not in this caſe a *Karz*-loan, but an *Areeat*-loan, whence he is not entitled to derive any other uſe from it than what was ſpecified: the caſe, therefore, becomes the ſame as if he had borrowed a *veſſel* or a *ſword* to decorate his ſhop.

---

* *Areeat* and *Karz* are, in common converſation, uſed indiſcriminately to denote a loan; but there is a diſtinction in law with regard to them. *Areeat* is uſed with reſpect to ſuch things as, after being lent to another, are identically returned to him; and *Karz*, with regard to ſuch things as are returned, not identically, but equal in point of number, weight, or meaſurement of capacity.—Thus where a perſon, having borrowed a book, and read it, afterwards returns it, it is conſidered as *Areeat*; but if a perſon ſhould borrow one hundred *dirms* from another, and after uſing them ſhould return another hundred *dirms*, it is conſidered as *Karz*.

† Arab. *Karz*.—As the *Engliſh* language makes no diſtinction between the terms

Land may be borrowed for the purpoſe of *building* or *plantations*: but the lender is at liberty to reſume it.

If a perſon borrow *land*, with a view to build upon it, or plant trees in it, it is lawful; becauſe the uſe to which the loan is to be applied is here aſcertained; and as ſuch uſe is the ſubject of property in *leaſes*, ſo alſo in *loans*.—But in this caſe it is permitted to the lender to reſume the land; and as he is to receive it back in the ſtate in which he lent it, he is therefore empowered to compel the borrower to remove his houſes or trees.—It is to be conſidered, however, whether or not any period was fixed for the loan.—If no period was fixed, then no compenſation is due by the lender for the loſs he may have occaſioned to the borrower by the deſtruction of his buildings or trees, ſince no deceit was practiſed on the borrower, but rather he deceived himſelf, in truſting to a contract which was abſolute and unaccompanied with any condition.—If, on the other hand, a period was fixed for the loan, and it be reſumed before the expiration of that period, the reſumption ſo made is valid, ſince a lender (as was before

---

Karz and *Areeat*, (although eſſentially different in their effect,) the tranſlator is under the neceſſity of adopting the term *loan* in both inſtances;—leaving it to the reader to conceive the *original* term from the context.

explained) may reſume a loan when he pleaſes: but it is nevertheleſs *abominable* in this inſtance, as it involves a breach of promiſe, and the lender is reſponſible to the borrower for the loſs he ſuſtains in the removal of his trees and buildings, in as much as he deceived the borrower in fixing a period which it was natural to ſuppoſe he would adhere to:—the borrower, therefore, is entitled to a compenſation from the lender, in conſideration of the damage he receives: and the ſame is mentioned by *Kadooree* in his compendium.—*Hakim Shaheed* maintains that the borrower is at liberty either to take from the lender the value of the trees and buildings, (in which caſe they become the property of the lender,) or to take a compenſation for his loſs, (in which caſe he is at liberty to carry away the trees and the buildings.) Lawyers have obſerved that if the removal of the trees and buildings be detrimental to the ground, the choice of the alternative reſts with the proprietor of the ground, as he is the *principal*, and the borrower the *ſecondary*, and a preference is always given to the *principal*.

If a perſon borrow a piece of land for the cultivation of grain, the lender has not the power of reſuming the loan until the gathering in of the grain, whether a period have been fixed or not; becauſe the gathering of the crop comes within a certain and known period; and in ſuffering it to remain on the ground, an obſervance of the right of both the lender and borrower is maintained, in the ſame manner as, under ſimilar circumſtances, in the caſe of a *leaſe*. It is otherwiſe with reſpect to *trees*; becauſe, as the period of their exiſtence is uncertain, the ſuffering them to remain would be an injury to the lender.

Land borrowed for the purpoſe of *tillage* cannot be reſumed until the crop be reaped from it.

The charges of returning the loan muſt be defrayed by the borrower; becauſe, as the reſtitution of it is incumbent on him, (ſince he took it with a view to his own benefit,) he is conſequently liable to the expences attendant on ſuch reſtitution.—It is to be obſerved that the expences attending the return of the ſubject of a leaſe are incumbent

The *borrower* muſt defray the charges attending the reſtoration of a loan.

Digitized by Google

cumbent on the leſſor; becauſe the rent being a return for the benefit ariſing from the tenure of the article let, all that is required from the leſſee is merely to put it in the power of the leſſor to recover it, by diveſting himſelf of it, and not that he ſhould return it to him.—The expence of returning the ſubject of an *uſurpation*, on the contrary, muſt be defrayed by the uſurper; for as the return of the article to the proprietor is incumbent on the uſurper of it in order to remedy the injury he occaſioned, ſo the expence attendant on ſuch return muſt of conſequence be borne by him.

In reſtoring an *animal* borrowed, it ſuffices that it be returned to the owner's *ſtable*;

If a perſon, having borrowed a quadruped from another, ſhould reſtore it to the ſtable of the proprietor, and it be afterwards loſt, in that caſe he is not reſponſible for it, on a favourable conſtruction.—Analogy would ſuggeſt that he is reſponſible, ſince he has neither reſtored it to the proprietor nor his agent, but merely to his *ground*.—The reaſon for a more favourable conſtruction of the law in this inſtance is, that a reſtitution has here been made according to general cuſtom, ſince it is cuſtomary to reſtore loans to the houſe of the proprietor; as where, for inſtance, veſſels or utenſils belonging to a houſe are borrowed, in which caſe it is uſual to return them, not into the proprietor's hands, but merely to his *houſe*.—Beſides, if he had returned the quadruped to the proprietor, he [the proprietor] would have ſent it to the ſtable, and therefore his doing ſo at once is conſidered as a valid return.

and, in reſtoring a *ſlave*, that he be returned to his maſter's *houſe*.

If a perſon borrow a ſlave, and afterwards return him to the houſe of his maſter without delivering him, perſonally, to the maſter himſelf, he is not in that caſe reſponſible for him for the reaſons abovementioned.—If, on the contrary, an uſurper or a truſtee return the ſubject of the uſurpation or the truſt to the houſe of the proprietor, without delivering it to the proprietor, they are in that caſe reſponſible for the eventual loſs of it:—the uſurper, becauſe it was incumbent on him to undo his act, and his act cannot be undone but by a delivery to the proprietor himſelf; and the truſtee, becauſe the proprietor did not wiſh that he ſhould deliver the depoſit merely to his *houſe* or his *family*, for if that had been the caſe, he would not have depoſited it with him.—It is otherwiſe with reſpect to *loans*, as theſe are commonly returned to the *houſe:* excepting, however, where they conſiſt of *jewels*, for in that caſe they muſt be returned to the *proprietor*, and not to the *houſe* or *family*.

It ſuffices to return the loan by a ſlave or ſervant either of the *borrower*

If the borrower ſend the quadruped he had borrowed to the proprietor of it, by his own ſlave or his hireling, and it be loſt in the way, in that caſe he is not reſponſible for it.—(By *hireling* is here to be underſtood a ſervant who receives *yearly* wages.)—The reaſon of this is that a loan is in the nature of a truſt; and the borrower may commit it, for the ſake of preſervation, into the hands of any of his family, in which relation a ſlave and a yearly ſervant ſtand.—It is otherwiſe with reſpect to a *daily* ſervant, as he is not held to be one of the family.

or *lender*.

If a borrower ſhould ſend back the horſe or other animal he had borrowed to the proprietor, by the ſlave or the hireling of the proprietor, and it be loſt or deſtroyed on the way, he is not reſponſible for it, ſince the proprietor is virtually ſuppoſed to have approved of this, in as much as he himſelf, if a delivery had been made to him, would have conſigned the horſe to one of theſe.—Some have ſaid that the law here proceeds on the ſuppoſition of the ſlave or hireling, to whom the quadruped is conſigned, being the one to whom the care and management of it is always given. Others, again, have ſaid that it matters not whether it be conſigned to ſuch a ſlave, or to any other ſlave of the proprietor: and this latter is the moſt approved doctrine.

If it be returned by a *ſtranger*, the borrower is reſponſible.

If a borrower ſhould ſend the quadruped to the proprietor by the hands of a ſtranger, he becomes in that caſe reſponſible for it, and muſt make good the value in the event of its loſs.—It is to be obſerved that this caſe ſeems to imply the illegality of a borrower's *depoſiting* a loan with a ſtranger; ſince, if that were lawful, he would not, in the preſent inſtance, be reſponſible.—Such alſo is the opinion of ſome of our modern doctors.—Others of them have ſaid that it is lawful for a borrower to *depoſit* the loan, becauſe the contract of depoſit is inferior to that of loan; and they have reconciled the doctrine, in the preſent caſe, by obſerving that the borrower does neceſſarily become reſponſible on ſending the loan by a ſtranger, ſince from the moment of his conſigning it to a ſtranger the loan determines, and being no longer a *borrower*, he becomes of conſequence reſponſible.—Our doctors, however, do not admit the legality of a borrower's depoſit, unleſs he be the borrower of a borrower, which in fact is not a *borrower*.

Terms in which a contract of loan with reſpect to *land* muſt be expreſſed.

If a perſon lend a piece of fallow ground to another, that he may cultivate it, the borrower muſt inſert, in the contract of loan, the words "You have given me to eat of this land."—This is according to *Haneefa*. The two diſciples have ſaid that the term *Areeat* or *loan* muſt be inſerted; becauſe the term *Areeat* is particularly uſed to expreſs a *loan*; and it is preferable that a contract of loan be expreſſed in terms particularly appropriated to loans;—as in the loan of a *houſe*, for inſtance, where the borrower expreſſes the contract "You have *lent* me this houſe." The argument of *Haneefa* is, that the words "You have given me to eat "of this land," are more expreſſive of the fact, ſince the term *Itaam* [giving to eat] is particularly reſtricted to the *produce of land*; whereas the words "You have lent me this ground, may apply to any other object, ſuch as building, or the like.—The uſe of the former, therefore, in the caſe in queſtion, is by much the moſt adviſeable.—It is otherwiſe with reſpect to a *houſe*, becauſe the loan of it is given for no other purpoſe than that of *reſidence*.

H E D Á Y A.

BOOK XXX.

Of HIBBA, or GIFTS.

Definition of the terms uſed in gift.

HIBBA, in its literal ſenſe, ſignifies the donation of a thing from which the *donee* may derive a benefit: in the language of the LAW, it means a transfer of property, made immediately, and without any exchange.—The perſon making the transfer is termed the *Wàhib*, or *donor*;—the perſon to whom it is made the *Mohoob-le-hoo*, or *donee*;—and the thing itſelf the *Mohoob*, or *gift*.

Chap. I. Introductory.
Chap. II. Of Retractation of a Gift.

CHAP. I.

Gifts are law-ful;

DEEDS OF GIFT are lawful; becauſe the prophet has ſaid, "*Send ye preſents to each other for the increaſe of your love,*" which implies the legality of gifts, as by *preſents* is meant *gifts*. All our doctors, moreover, concur in the validity of them.

and rendered valid by tender, accept-ance, and ſeizin.

GIFTS are rendered valid by tender, acceptance, and ſeizin.—Tender and acceptance are neceſſary, becauſe a gift is a contract, and tender and acceptance are requiſite in the formation of all contracts: and ſeizin is neceſſary in order to eſtabliſh a right of property in the gift, becauſe a right of property, according to our doctors, is not eſtabliſhed in the thing given merely by means of the *contract*, without ſeizin.—*Malik* alleges that right of property is eſtabliſhed in a gift antecedent to ſeizin, becauſe of its analogous reſemblance to ſale: and the ſame difference of opinion obtains with reſpect to *alms-gift*.—The arguments of our doctors upon this point are twofold.—FIRST, the prophet has ſaid, "*A gift is not valid without ſeizin,*" (meaning that the right of property is not eſtabliſhed in a gift until after ſeizin.)—SECONDLY, gifts are voluntary deeds; and if the right of property were eſtabliſhed in them previous to the ſeizin, it would follow that the delivery would be incumbent on the voluntary agent before he had voluntarily engaged for it.—It is otherwiſe with reſpect to *wills*; becauſe the time of eſtabliſhment of a right of property in a legacy is at *the death of the teſtator*; and he is then in a ſituation which precludes the poſſibility of rendering any thing binding upon himſelf.

Digitized by Google

OBJECTION.—Although a dead perſon be not capable of being bound, ſtill an obligation may lie againſt his heir, who is his ſucceſſor and repreſentative.

REPLY.—The heir is not proprietor of the legacy, and cannot therefore be ſubjected to obligation on account of it.

A gift may be taken poſſeſſion of on the ſpot where it is tendered, without the expreſs order of the donor: but not afterwards.

IF the donee take poſſeſſion of the gift, in the meeting of the deed of gift *, without the order of the giver, it is lawful, upon a favourable conſtruction.—If, on the contrary, he ſhould take poſſeſſion of the gift after the breaking up of the meeting, it is not lawful, unleſs he have had the conſent of the giver ſo to do.—Analogy would ſuggeſt that the ſeizin is not valid in either caſe, as it is an act with reſpect to what is ſtill the property of the giver; for as his right of property continues in force until ſeizin, *that* is conſequently invalid without his conſent. The reaſon for a more favourable conſtruction of the law, in the inſtance in queſtion, is that ſeizin, in a caſe of gift, is ſimilar to acceptance in ſale, on this conſideration, that in the one the effect of the deed (that is, the eſtabliſhment of a right of property) reſts upon the *ſeizin*, and in the other upon the *acceptance*.—As, moreover, the object of a gift is the eſtabliſhment of a right of property, it follows that the tender of the giver is, virtually, an empowerment of the donee to take poſſeſſion.—It is otherwiſe where the ſeizin is made after the breaking up of the meeting; becauſe our doctors do not admit of the eſtabliſhment of the power over the thing but when ſeizin is immediately conjoined with acceptance; and as the validity of acceptance is particularly reſtricted to the place of the meeting, ſo alſo is the thing which is conjoined with it.—It is alſo otherwiſe where the giver prohibits the donee from taking poſſeſſion in the place of meeting, for in that caſe the ſeizin of the donee in the place of the meeting would be invalid, as arguments of implied intention cannot be put in competition with expreſs declaration.

---

* Arab. *Majlis Akid al Hibba*;—meaning, the place where the deed is executed.

A gift made from *diviſible* property muſt be divided off;—but not a gift made from *in*diviſible property.

*A GIFT of part of a thing which is capable of diviſion is not valid unleſs the ſaid part be divided off and ſeparated from the property of the donor: but a gift of part of an *indiviſible* thing is valid. *Shafeï* maintains that the gift is valid in either caſe; becauſe a gift is a deed conveying property, and valid, as ſuch, with regard either to things that are connected or ſeparated; in the ſame manner as in ſale.—The ground of this is that as an indefinite ſhare has the capacity to conſtitute property, it is conſequently a fit ſubject of gift: nor is a voluntary deed rendered null by the indefiniteneſs of the ſubject of it; as in a *Karz*-loan, for inſtance, where a perſon gives another one thouſand *dirms*, of which one half is to be in the nature of a loan, and the other of copartnerſhip; or as in *bequeſt*; or in the gift of *indiviſible* things.—The arguments of our doctors upon this point are twofold.—FIRST, ſeizin in caſes of gift is expreſsly ordained, and conſequently a complete ſeizin is a neceſſary condition: but a complete ſeizin is impracticable with reſpect to an indefinite part of *diviſible* things, as it is impoſſible, in ſuch, to make ſeizin of the thing given without its conjunction with ſomething that is *not* given; and that is a defective ſeizin.—SECONDLY, if the gift of part of a diviſible thing, without ſeparation, were lawful, it muſt neceſſarily follow that a thing is incumbent upon the giver which he has not engaged for,—namely, a *diviſion*, which may poſſibly be injurious to him; (whence it is that a gift is not complete and valid until it be taken poſſeſſion of; ſince if it were valid before ſeizin, a thing would be incumbent upon the donor which he has not engaged for,—namely, *delivery*.)—It is otherwiſe with reſpect to articles of an *in*diviſible nature; becauſe in thoſe a *complete* ſeizin is altogether impracticable, and hence an *incomplete* ſeizin muſt neceſſarily ſuffice, ſince this is all that the article admits of;—and alſo, becauſe in this inſtance the donor does not incur the inconvenience of a diviſion.

---

* A ſmall portion of the text immediately preceding, which relates to words ſynonimous, either directly, or by implication, to the word *Hibba*, or gift, has been neceſſarily omitted in the tranſlation.

Objection.—Analogy would ſuggeſt that the gift of a part of an indiviſible article is invalid; becauſe, although the donor do not, in ſuch a caſe, incur the inconvenience of a diviſion, ſtill he incurs a participation in the property; and this alſo is a ſort of inconvenience.

Reply.—The donor is ſubjected to a participation in a thing which is not the ſubject of his grant, namely, the *uſe* [of the whole indiviſible article,] for his gift related to the *ſubſtance* of the article, not to the *uſe* of it:—hence the neceſſity of a participation is not incurred by him with reſpect to the thing which is, properly, the ſubject of his grant.

—With reſpect to the analogy advanced by *Shafeï* between the caſe in queſtion and that of *Karz*-loan, or bequeſt, it is totally unfounded; becauſe in bequeſts the ſeizin [of the legatee] is *not* a neceſſary condition; neither is it ſo in a valid ſale;—and although ſeizin be requiſite in *Sillim* and *Sirf* ſales, ſtill it is not ordained with reſpect to them, and hence is not required to be *complete* in thoſe inſtances. Beſides, as all thoſe contracts [of ſale] are contracts of reſponſibility, the obligation of a diviſion is agreeable to them.—With reſpect to a *Karz*-loan, it is a voluntary contract in the *beginning*, but a contract of reſponſibility in the *end* (ſince it involves reſponſibility for a *ſimilar*;) and hence, in conſideration of its reſemblance to both, an *incomplete ſeizin* is made a condition in it, not a *diviſion*: beſides, ſeizin is not eſpecially ordained in this inſtance.

If a perſon make a gift, to his partner, of his ſhare in the partnerſhip-ſtock, capable of diviſion, it is invalid, becauſe of the invalidity of the gift of an undefined part of a diviſible ſubject, as before explained.

Digitized by Google

If a perſon make a gift, to another, of an undefined portion of land, (ſuch as an *half*, or a *fourth*,) ſuch gift is null, for the reaſons already ſet forth.—If, however, he afterwards divide it off, and make delivery of it, the gift becomes valid; becauſe a gift is rendered complete by ſeizin; and in this caſe nothing elſe remains indefinitely involved with the gift at the time of ſeizin.

A gift of an article implicated in another article is utterly invalid.

If a perſon make a gift of the flour of wheat, which is yet in grain, or of oil of *Seſſamé* which is not yet expreſſed from the ſeeds, ſuch gift is invalid; and if he afterwards grind the wheat into flour, or extract the oil from the *Seſſamé* ſeeds, and ſo deliver them to the donee, ſtill the gift is not thereby rendered valid.—The ſame rule alſo holds with reſpect to butter which is yet in milk.—The reaſon of this is that the thing given, in all theſe caſes, is a nonentity; (whence it is that if an uſurper of wheat, or of ſeeds, ſhould either grind the one into flour, or preſs the other into oil, he then becomes proprietor of them;) and as a nonentity cannot be a ſubject of property, the deeds in queſtion are therefore null, and cannot afterwards be rendered valid otherwiſe than by being executed *de novo*.—It is different in the preceding caſe, becauſe an undefined portion of any thing is nevertheleſs capable of being transferred.

The gift of milk in the udder, of wool upon the back of a goat, of grain or trees upon the ground, or of fruit upon trees, is in the nature of the gift of an undefined part of a thing, becauſe in theſe inſtances the cauſe of invalidity is the conjunction of the thing given with what is not given, which is a bar to the ſeizin, in the ſame manner as in the caſe of undivided things.

The gift of a depoſit to the truſtee is valid without a formal delivery and ſeizin.

If the thing given be in the hands of the donee, in virtue of a truſt, the gift is in that caſe complete, although there be no formal ſeizin, ſince the actual article is already in the donee's hands, whence his ſeizin is not requiſite. It is otherwiſe where a depoſitor *ſells* the depoſit to his truſtee, for in this caſe the original ſeizin does not ſuffice, becauſe ſeizin in virtue of purchaſe is a ſeizin inducing reſponſibility, and therefore cannot be ſubſtituted by a ſeizin in virtue of a *truſt*; but ſeizin in virtue of *gift*, on the contrary, as not being a ſeizin inducing reſponſibility, may be ſubſtituted by a ſeizin in virtue of a truſt.

The gift, by a father to his infant ſon, of any thing either actually or virtually in his poſſeſſion, is valid in virtue of his [the father's] ſeizin:

If a father make a gift of ſomething to his infant ſon, the infant, in virtue of the gift, becomes proprietor of the ſame, provided the thing given be, at the time, in the poſſeſſion either of the father or of his truſtee; becauſe the poſſeſſion of the father is capable of becoming poſſeſſion in virtue of gift, and the poſſeſſion of the truſtee is equivalent to that of the father. (It were otherwiſe if the thing given have been pawned or uſurped by another, or ſold by an invalid ſale; becauſe a pawn and an uſurpation are in the poſſeſſion of another, and the ſubject of an invalid ſale is the property of another.)—The ſame rule holds when a *mother* gives ſomething to her infant ſon whom ſhe maintains, and of whom the father is dead, and no guardian provided: and ſo alſo, with reſpect to the gift of any other perſon maintaining a child under theſe circumſtances.—It is to be obſerved that the law with reſpect to ſeizin in caſes of alms-gift is ſimilar to that in gifts.—Thus if a perſon ſhould beſtow in alms, upon a pauper, any thing of which the pauper has poſſeſſion at the time, he [the pauper] in that caſe becomes proprietor of the ſame, without the neceſſity of a new ſeizin; and ſo alſo, if a father ſhould beſtow in alms, upon his infant ſon, ſomething of which he himſelf or his truſtee has the poſſeſſion, the infant becomes proprietor thereof:—contrary to where the thing ſo beſtowed has been pawned, loſt by uſurpation, or ſold by an invalid ſale.

and ſo alſo, a gift to an infant by a *ſtranger*.

If a *ſtranger* make a gift of a thing to an infant, the gift is rendered complete by the ſeizin of the father of the infant; for as he is maſter of deeds with reſpect to the child liable to both good and evil, (ſuch as ſale,)

ſale,) he is conſequently, in a ſuperior degree, maſter of gift, which is purely advantageous.

If a perſon make a gift of a thing to an orphan, and it be ſeized in his behalf by his guardian,—being either the executor appointed by his father,—or his grandfather, or the executor appointed by his grandfather, it is valid; becauſe all theſe relatives have an authority over the orphan, as they ſtand in the place of his father.

Gift to an *orphan* is rendered valid by the ſeizin of his *guardian*;

If a fatherleſs child be under charge of his mother, and ſhe take poſſeſſion of a gift made to him, it is valid; becauſe ſhe has an authority for the preſervation of him and his property; and the ſeizin of a gift made to him is in the nature of a preſervation of *himſelf*, ſince a child could not be ſubſiſted without property.—The ſame rule alſo holds with reſpect to a *ſtranger* who has the charge of an orphan;—becauſe as his ſeizin is of legal force, (whence it is that another ſtranger has not a right to take the orphan from him,) he is conſequently competent to all ſuch things as are purely for the advantage of the orphan.

and, to a *fatherleſs* infant, by the ſeizin of his *mother*.

If an infant ſhould himſelf take poſſeſſion of a thing given to him, it is valid, provided he be endowed with reaſon; becauſe ſuch an act is for his advantage; and he has a capability of performing it, as capability depends on reaſon and underſtanding, which he poſſeſſes.

Gift to a *rational* infant is rendered valid by the ſeizin of the infant himſelf.

It is lawful for a huſband to take poſſeſſion of any thing given to his wife, being an infant, provided ſhe have been ſent from her father's houſe to his; and this although the father be preſent; becauſe he is held, by implication, to have reſigned the management of her concerns to the huſband. It is otherwiſe where ſhe has not been ſent from her father's houſe, becauſe then the father is not held to have reſigned the management of her concerns. It is alſo otherwiſe with reſpect to a *mother*, or any *others* having charge of her; becauſe they are not entitled to poſſeſs themſelves of a gift in her behalf, unleſs the father be dead, or abſent, and his place of reſidence unknown; for their power is in virtue of neceſſity, and not from any ſuppoſed authority; and this neceſſity cannot exiſt whilſt the father is preſent.

A houſe may be conveyed in gift by *two* perſons to *one*;

If two perſons, jointly, make a gift of a houſe to one man, it is valid; becauſe, as they deliver it over to him wholly, and he receives it wholly, no mixture of property can be ſaid to exiſt at the time of ſeizin.

but not by *one* perſon to *two*.

If one man make a gift of a houſe to two men, the deed is invalid, according to *Haneefa*. The two diſciples hold it to be valid, becauſe as the donor gives the *whole* of the houſe to each of the two donees (in as much as there is only *one* conveyance) there is conſequently no mixture of property; in the ſame manner as where one man pawns a houſe to two men.—The arguments of *Haneefa* upon this point are twofold.—First, the gift, in this caſe, is a gift of *half* the houſe to *each* of the donees, (as is evident from this, that if one man give to two men ſomething incapable of diviſion, and one of them accept the ſame, the gift becomes valid with reſpect to his ſhare;)—and ſuch being the caſe, it follows that, at the time of ſeizin by each of the donees, a mixture of property muſt take place. Secondly, as a right of property is eſtabliſhed in each of the donees, in the extent of one half, it follows that the conveyance or inveſtiture muſt alſo be in the ſame proportions, ſince the right of property is an effect of the conveyance: on this conſideration, therefore, that a right of property is eſtabliſhed in each with reſpect to one half, an indefinite mixture of their reſpective ſhares in the gift is fully eſtabliſhed.—It is otherwiſe in a caſe of *pawn*, becauſe the effect of that is *detention*, not *right of property*, and the right of detention is wholly and completely eſtabliſhed in each of the pawn-holders, reſpectively, inſomuch that if the pawner ſhould diſcharge the debt of one of them, ſtill the right of the other to a complete detention remains unimpaired.

Diſtinction between joint gift or alms to the rich and to the poor.

IT is recorded, in the *Jama Sagheer*, that if a rich man beſtow ten *dirms*, in alms, upon two poor men, or make a gift of that ſum to them, it is valid; but that if the ſaid charity or gift be made to two *rich* men, it is invalid. (The two diſciples maintain that in this laſt inſtance both gift and alms are valid.)—From this it appears that *Haneefa* has conſtrued a gift into *alms*, when the object is a *poor* man; and alms into a *gift*, when the object is a *rich* man,—becauſe of the ſimilarity betwixt theſe deeds, as each is a conveyance of property without an exchange. Hence *Haneefa* has made a difference with reſpect to them, as appears by the caſe recited in the *Jama Sagheer*, ſince he has admitted of charity to two poor men, but not of a gift to two *rich* men; whilſt in the *Mabſoot* he has made no difference between them, but on the contrary has declared them to be equal, as he there declares "neither a gift nor alms to *two* men is valid, becauſe "the mixture of property is a bar in both caſes, as both are de- "pendant on a perfect ſeizin."—The reaſon of the diſtinction in the *Jama Sagheer* is that the end of alms is *to give to* GOD, who is one; and the alms comes not to the poor men, but as their daily food from GOD Almighty; whereas the *gift* goes directly to the object of it, namely, *the two men*.—Some have ſaid that the recital in the *Jama Sagheer* is the moſt approved doctrine; and that the meaning of the doctrine in the *Mabſoot* is that charity to two *rich* men is invalid, in the ſame manner as a *gift* to two men of *any* deſcription.

Caſe of the gift of a houſe in ſeparate lots.

IF a perſon make a gift to two men, of one third of his houſe to one of them, and of one third to the other, it is invalid according to the two diſciples, and according to *Mohammed* it is valid. If, however, he make a gift of one half to one, and one half to the other, there are in that caſe two reports with reſpect to the opinion of *Aboo*

Yooſaf.—According to the two principles maintained by *Haneefa* the gift in that caſe is invalid; whereas, according to the principles of *Mohammed*, it is valid.—The reaſon of the diſtinction, in the latter inſtance, as maintained by *Aboo Yooſaf*, is that becauſe of the expreſs apportioning of the gift, it becomes evident that the object of the giver was to eſtabliſh a part of the property in each, by which means a mixture of the property muſt inevitably take place;—whence it is that it is not lawful for a perſon to pawn a thing into the hands of two, by apportioning an half of it ſeparately to each.

CHAP. II.

Of Retractation of Gifts.

The donor may retract his gift to a ſtranger;

It is lawful for a donor to retract the gift he may have made to a ſtranger. *Shafeï* maintains that this is not lawful; becauſe the prophet has ſaid, "*Let not a donor retract his gift*; *but let a* FATHER, "*if he pleaſe, retract a gift he may have made to his* SON;" and alſo, becauſe *retractation* is the very oppoſite to *conveyance*,—and as a deed of gift is a deed of conveyance, it conſequently cannot admit its oppoſite. It is otherwiſe with reſpect to a gift made by a father to his ſon, becauſe (according to his tenets) the conveyance of property from a father to the ſon can never be complete; for it is a rule with him that a father has a power over the property of his ſon.—The arguments of our doctors upon this point are twofold.—FIRST, the prophet has ſaid, "*A donor preſerves a right to his gift, ſo long as he* "*does not obtain a return for it.*"—SECONDLY, the object of a gift to a ſtranger is a return;—for it is a cuſtom to ſend preſents to a perſon of high rank that he may protect the donor; to a perſon of inferior rank that the donor may obtain his ſervices; and to a perſon of equal rank that he may obtain an equivalent;—and ſuch being the caſe, it follows that the donor has a power of annulment, ſo long as the object of the deed is not anſwered, ſince a gift is capable of annulment. With reſpect to the tradition of the prophet quoted by *Shafeï*, the meaning of it is that the donor is not *himſelf* empowered to retract his gift, as that muſt be done by a decree of the *Kâzee*, with the conſent of the donee,—excepting in the caſe of a *father*, who is himſelf competent to retract a gift to his ſon, when he wants it for the maintenance of the ſon; and this is *metaphorically* termed a *retractation*.—It is to be obſerved, however, that although a retractation of a gift be agreeable to the letter of the law, ſtill it induces abomination; for the prophet has ſaid "*The retractation of a gift is like eating one's ſpittle.*" It is further to be obſerved, that the bars to a retractation of a gift are many,—amongſt which are the following:—I. The donee giving the donor a return or conſideration; becauſe this fulfills the donor's object.—II. The incorporation of an increaſe with the gift; becauſe in that inſtance a retractation cannot take place without including the increaſe, as that is implicated; and it cannot take place ſo as to include the increaſe, ſince that was not included in the deed of gift.—III. The death of one of the parties; for if the *donee* ſhould die, his property ſhifts to his heir, and becomes the ſame as if it had ſhifted during his lifetime; and if the *donor* ſhould die, his heirs are ſtrangers with reſpect to the contract, ſince they made no tender of the thing given.—IV. The alienation of the gift from the donee's property during his lifetime; becauſe this is a conſequence of the power veſted in him by the gift, which power, therefore, cannot then be retracted; and alſo becauſe the right of property has regenerated in another perſon, in virtue of a freſh cauſe, namely, conveyance to a ſecond donee; and as a regeneration of the right of property is equivalent to an eſſential change in the thing, the caſe is therefore the ſame as if the gift were to

but there are various circumſtances which bar the retractation.

Digitized by Google

to become, in effect, a different thing from what it was, and conſequently not liable to retractation.

A gift of *land* cannot be retracted after the donee has *built* or *planted* on it.

If a perſon make a gift to another of a piece of land deſtitute of buildings or plantations, and the donee plant trees in it, or build a houſe, a ſtable, or a ſhop of ſuch a ſize as to be deemed an increaſe, in that caſe the donor is not entitled to retract the gift, becauſe of the increaſe which it has received.—The reſtriction is ſtated with reſpect to the ſhop, becauſe ſhops are ſometimes ſo ſmall as not to be deemed an increaſe, and ſometimes the land is very extenſive, the ſhop occupying only one particular part of it; in which caſe the bar operates only with reſpect to that part.

After the ſale of a *part* of the land by the donee, the donor may reſume the remainder.

If the donee ſell one half of granted land undivided, the donor may in that caſe reſume the other half, as to the reſumption of that no bar exiſts. If, on the other hand, the donee ſhould *not* have ſold any part of the land, the donor may reſume one half of it, for as he is entitled to reſume the whole, it follows that he is entitled to reſume the half, *a fortiori.*

A gift to a *kinſman* cannot be reſumed:

If a perſon make a gift of any thing to his relation within the prohibited degrees, it is not lawful for him to reſume it, becauſe the prophet has ſaid, "*When a gift is made to a prohibited relation, it muſt not* "*be reſumed*;"—and alſo becauſe the object of the gift is an increaſe of the ties of affinity, which is thereby obtained.

nor a gift to a *huſband* or *wife* during marriage.

If a huſband make a gift of any thing to his wife, or a wife to her huſband, it cannot be retracted, becauſe the object of the gift is an improvement of affection (in the ſame manner as in the caſe of preſents to relations;) and as the object is obtained, the gift cannot be retracted*.

---

* Becauſe of the exiſtence of the *firſt* bar beforementioned; for the increaſe of affection excited in the wife by the gift is ſuppoſed, by the law, to be a *return* which ſhe pays for it, and which conſequently deprives the donor of the power of retractation.

This object, however, is to be regarded only during the exiſtent period of the contract; inſomuch that if a perſon give ſomething to a ſtrange woman, and afterwards marry her, he may retract the gift;—whereas, if a man give ſomething to his wife, and afterwards divorce her three times, he is not entitled to retract the gift.

The receipt of a return prohibits retractation,

IF the donee ſay to the donor "Take this thing in exchange for "your gift," and he accept it, the right of retractation is annulled, becauſe of the donor having obtained the object of his gift.

although the return be given by a *ſtranger*.

IF a ſtranger, on behalf of a donee, give ſomething gratuitouſly* to the donor in exchange for his gift, and the donor accept the ſame, the right of retractation then ceaſes; becauſe a ſtranger may lawfully give a compenſation for the relinquiſhment of a right, in the ſame manner as in caſes of *Khoola* or compoſition.

If a part of the gift prove the property of another, a proportionable part of the return may be reſumed.

IF the half of a gift prove the property of ſome other than the donor, the donee is in that caſe entitled to take back from the donor half of the return he may have made him for the gift, ſince the thing oppoſed to that half was not ſecured and rendered ſafe to him. If, on the contrary, half the return prove the property of ſome other than the donee, the donor is not in that caſe entitled to take back from the donee a particular part of the gift; but he may reſtore the remaining part of the return, and then reſume the whole of the gift from the donee.—*Ziffer* maintains that the donor may take back half of the gift, as he conſiders this caſe to be analogous to that of part of the gift proving the property of another.—The reaſoning of our doctors, in ſupport of their opinion, is that the remaining part of the return has a fitneſs to be conſidered as a return for the *whole* of the gift from the beginning: as, moreover, in conſequence of half the return proving the right of another, it becomes apparent that there is no other return for the gift than the remaining part, it follows that the donor is not entitled to reſume an equivalent from the gift.—He is, however, allowed an option in this inſtance, with reſpect to the whole gift, becauſe he did not relinquiſh his right of retractation on any other condition than that of the ſecurity of the whole of the return; and as that does not prove compleatly ſecure to him, he is therefore at liberty to reſtore the remaining half of the return, and to take back the whole of the gift.

---

* Arab. *Tibbarrān*; that is, of his own accord, and without ſolicitation.

When the return is oppoſed only to a *part*, the remainder of the gift may be reſumed.

If a perſon make a gift of a *houſe* to another, and the donee give a return to the donor for a *half* only of the houſe ſo given, the donor may in that caſe reſume the half of the houſe for which he received no exchange, ſince a bar to his retractation exiſted only with reſpect to the *other* half.

Retractation requires *mutual conſent*, or a *decree*.

A gift cannot lawfully be retracted but with the conſent of both parties, or by a decree of the *Kázee*, becauſe the retractation of a gift is a diſputed point amongſt the learned. There is, moreover, a degree of weakneſs in a retractation, becauſe the admiſſion of it is contrary to analogy, ſince it is a power over the property of another, as the right of property in a gift is eſtabliſhed in the donee. Beſides, as there may ariſe a contention with reſpect to the object in lieu of it, (ſince the donor may claim ſomething which the donee may refuſe,) the contention, therefore, cannot poſſibly be ſettled but by the conſent of the parties, or by a decree of the *Kázee*,—inſomuch that if the gift be a *ſlave*, and the donee ſhould have emancipated him previous to the decree of the *Kázee*, the emancipation holds good. If the donor ſhould prohibit the donee from keeping poſſeſſion of the gift, and he nevertheleſs retain poſſeſſion of it, and it be loſt or deſtroyed in his hands, he is not reſponſible for it, becauſe his right of property in it is held ſtill to continue in force.—The ſame rule alſo holds where the gift is loſt or deſtroyed in the poſſeſſion of the donee, ſubſequent to the decree of the *Kázee*, but prior to the demand of it by the donor, becauſe the original tenure by which he held it was not a tenure of reſponſibility, and that tenure ſtill exiſts.—But if the donor demand the article, and prohibit the donee from keeping poſſeſſion of it, *ſubſequent* to a decree of the *Kâzee*, and the donee nevertheleſs continue to retain it, he is reſponſible for it, as he is then guilty of a tranſgreſſion.

The donor's re-poſſeſſion of the gift is not requiſite to the validity of retractation.

WHEN a perſon retracts his gift, either in virtue of a decree of the *Kâzee*, or of the mutual conſent of the parties, it is an annulment of the original gift, and not a gift *de novo* on the part of the donee, and therefore ſeizin by the donor is not in ſuch caſe a requiſite condition. Retractation, moreover, is lawful with reſpect to an undivided portion; but if a retractation were a gift *de novo*, ſeizin would be a requiſite condition, and conſequently retractation with reſpect to an undivided portion would not be lawful. The reaſon of this is that a deed of gift is valid under the reſervation of a right of annulment. The donor, therefore, in annulling the deed, does no more than poſſeſs himſelf of his own eſtabliſhed right; and hence a retractation is an annulment in all caſes, that is, whether it take place in virtue of a decree of the *Kâzee*, or by the conſent of both parties.—It is otherwiſe with reſpect to a buyer's return of goods on account of a defect without a decree of the *Kâzee*; for that, with reſpect to a *third* perſon, is conſidered as a contract *de novo*, ſince the purchaſer has not a power of annulment, but has merely a right to the quality of ſafety in the goods; and in defect of that quality, he is, from a principle of neceſſity, allowed to annul the contract.—Its being an *annulment*, therefore, with reſpect to any *third* perſon, muſt depend upon the *Kâzee*'s decree.—Hence there is an eſſential difference between the retractation of a gift, and the return of goods on account of a defect.

The donee, incurring any reſponſibility in conſequence of a

IF the ſubſtance of a gift prove the property of another after it has been deſtroyed, and the donee make good the loſs to the proprietor, in that caſe he is not entitled to receive any thing in compenſation from gift, receives no compenſation from the donor.

from the donor; becauſe a gift is a gratuitous contract, and a donee has no right to the ſecurity or ſafety of the gift, nor is he entitled to act in behalf of the donor.—Hence he is not entitled to any thing from the donor, notwithſtanding the fraud that has been practiſed upon him; for although fraud be a cauſe of a reſumption in a contract of *mutual exchange*, it is not ſo in a contract *not* of mutual exchange.

A mutual gift requires mutual ſeizin.

If a perſon give ſomething to another on condition of that other giving ſomething to him in exchange for it, the mutual ſeizin of the reſpective returns is regarded; that is to ſay, the contract is nothing until the two ſeizins take place, and is made null by the ſubject of it, on either ſide, being mixed with other property.—The reaſon of this is, that a deed of this nature is in its original a *gift*; but whenever the two ſeizins take place, it becomes, in effect, a *ſale*; and, as ſuch, a return may be made on account of a defect, or from an option of inſpection; and the right of *Shaffa* is alſo connected with it.—*Ziffer* and *Shafeï* maintain that this is a ſale both originally and ultimately, in as much as the characteriſtic of ſale, namely, *a conveyance of property for a return*, exiſts in it; and in all contracts regard muſt be paid to the *ſpirit* of them, inſomuch that if a maſter ſhould ſell his own ſlave to the ſlave himſelf, he [the ſlave] is in that caſe free.—The arguments of our doctors are, that the contract comprehends two different ſhapes or deſcriptions.—I. It is a *gift* with reſpect to the *letter*.—II. It is a *ſale* with reſpect to the *ſpirit*. It is therefore requiſite to pay attention to both in the utmoſt poſſible degree. Now, in the deed at preſent under conſideration, an obſervance of both is practicable; becauſe, in a *gift*, the right of property is ſuſpended till ſeizin; and, in a *ſale*, the right of property is undone in caſe of any invalidity. The effect of ſale, moreover, is obligation: and a gift alſo becomes obligatory upon giving a return for it.—Out of attention, therefore, to both ſhapes, the contract is conſidered as being originally a gift, and ultimately a ſale. It is otherwiſe with reſpect to the ſale of the

Digitized by Google

the perſon of a ſlave to the ſlave himſelf; for it is impoſſible in any reſpect to conſider this as a ſale, ſince a ſlave cannot poſſibly be maſter of himſelf.

SECTION.

The gift of a pregnant ſlave includes a gift of her *fœtus*,

If a perſon make a gift to another of a female ſlave, and except the child in her womb, the gift is valid;—but the exception is null; becauſe an exception is never valid unleſs it relate to ſuch a thing as might have been the ſubject of the deed; and a child in the womb cannot be the ſubject of gift, becauſe it is equivalent to a conſtituent part, like the members of the body, as has been already ſhewn in treating of ſale:—ſuch, therefore, being the caſe, the exception is in effect the ſame as an invalid condition: hence the gift remains in force; and the exception is null.—The ſame rule alſo holds in caſes of marriage, *Khoola*, and compoſition for wilful bloodſhed;—that is to ſay, if a perſon aſſign *a female ſlave* (for inſtance) as the dower, in marriage, or as the conſideration for *Khoola*, or the compoſition for wilful bloodſhed, and except the child in her womb, the deed is valid, but the exception is null; becauſe none of theſe contracts are invalidated by the inſertion of an invalid condition.—It is otherwiſe in caſes of *ſale*, *leaſe*, or *pawnage*; for theſe are all rendered invalid by involving an invalid condition.

unleſs that have been previouſly emancipated.

If a maſter emancipate the fœtus in the womb of his female ſlave, and afterwards make a gift of the ſlave to ſome perſon, it is valid; becauſe as the fœtus is not, in this inſtance, the property of the donor, it therefore is not dependant on the gift, in the manner that an *exception* is.

If the fœtus have been previouſly created a *Modabbir* the gift is null.

If a maſter create the fœtus in the womb of his female ſlave a *Modabbir*, and afterwards make a gift of the ſlave to ſome perſon, the gift is not valid; becauſe the child of the ſaid ſlave ſtill remains his property, and therefore his act of making it *Modabbir* does not reſemble an *exception*, but rather operates as a total bar to the legality of the gift: for as it is impoſſible to render the gift valid with reſpect to the child, becauſe of his being a *Modabbir*, it becomes the ſame as the gift of an undivided portion, or as the gift of a thing involved with the property of the donor.

The gift of a thing renders all proviſional conditions reſpecting it nugatory.

If a perſon make a gift of his female ſlave to another, on condition that he reſtore her to him, or that he emancipate her, or create her an *Am-Walid*,—or, if a perſon make a gift of a *houſe* to another, on condition that the donee give back a *part* of it,—or, if a perſon make a gift of his houſe in charity to another, on condition that the receiver of the charity give him ſomething in exchange for part of the houſe,—ſuch gift or charity is valid; but the condition annexed is invalid, becauſe it is contrary to the ſpirit or intendment of the contract; and neither gifts nor charities are affected by being accompanied with an invalid condition, becauſe the prophet approved of *Amrees* [gifts for life,] but held the condition annexed to them by the granter* to be void.—It is otherwiſe in *ſale*; becauſe the prophet has prohibited ſale with an invalid condition; and alſo becauſe invalid conditions, as being in the nature of uſury, manifeſt their effects in contracts of exchange, but not in ſuch as are not of the deſcription of exchange.

The gift of a debt, by a conditional exemption from it, is null.

If a perſon, having a debt due to him of one thouſand *dirms*, ſhould ſay to the debtor "when to-morrow arrives the ſaid thouſand "*dirms* are your property,"—or, "you are exempted from the "debt,"—or, if he ſhould ſay "whenever you pay me one *half* of "the ſaid thouſand the other half is *your property*," or "you are *ex-*

---

* Namely, the condition of reſtoration upon the demiſe of the grantee.

" *empted* from the debt of the other half,"—the gift ſo made is null. The reaſon of this is that the gift of a debt to a debtor is an *exemption:* but an exemption has two meanings:—I. It is a *conveyance of property*, on the principle of debts being property, on which account lawyers have held that " an exemption may be undone by a rejection:"—II. It is an *annulment*, ſince debt is in the nature of a quality, on which account an exemption does not reſt upon acceptance.—Now nothing can be ſuſpended on a condition excepting an *utter* annulment, ſuch as a divorce or an emancipation;—and an exemption (as has been already ſaid) is not an *utter* annulment, and therefore cannot be ſuſpended on a condition, but on the contrary is perfectly nugatory.

Caſe of *life-grants.*

AN *Amree*, or life-grant, is lawful to the grantee during his life, and deſcends to his heirs, becauſe of the tradition before quoted.—Beſides, the meaning of *Amree* is a gift of a *houſe* (for example) during the life of the donee, on condition of its being returned upon his death.—The conveyance of the houſe, therefore, is valid without any return; and the condition annexed is null, becauſe the prophet has ſanctioned the gift, in this inſtance, and annulled the condition, as before mentioned. An *Amree*, moreover, is nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered null by involving an invalid condition, as has been already demonſtrated.

IF one perſon ſay to another, " my houſe is yours by way of " *Rikba*," it is null, according to *Haneefa* and *Mohammed*. *Aboo Yooſaf* has ſaid that it is valid, becauſe his declaration " my houſe is " *yours*," is a *conveyance* of the houſe: and the condition of *Rikba* is invalid; becauſe the meaning of this phraſe is " if I die before you " then my houſe is yours,"—that is to ſay, he waits in expectation of the other's death, that the houſe may revert to himſelf:—*Rikba*, therefore, reſembles *Amree*.—The arguments of *Haneefa* and *Mohammed* upon this point are twofold.—FIRST, the prophet has legalized *Amree* and annulled *Rikba*.—SECONDLY, the meaning of " my houſe

" is yours by way of *Rikba*," is, " if I die before you, my houſe is " yours," which is a ſuſpenſion of the conveyance of property upon the deceaſe of the donor previous to that of the donee: and this is a matter of doubt and uncertainty, and conſequently null.—It is to be obſerved that *Rikba* is derived from *Irtikáb*, which means *expectation*; for the donor is, as it were, an *expectant* of the death of the donee.

SECTION.

Of SADKA, *or* ALMS-DEED.

Alms-deed requires ſeizin of the ſubject,

ALMS-DEED, like gift, is not valid unleſs attended with ſeizin, as it is gratuitous, in the ſame manner as a gift. Neither is an alms lawful, where it conſiſts of an undivided part of a thing capable of diviſion, for the reaſons already explained in the caſe of a gift under theſe circumſtances.

and cannot be retracted.

RETRACTATION of alms is not lawful; becauſe the object, in alms, is *merit in the ſight of* GOD, and that has been obtained. If, alſo, a perſon beſtow alms upon a *rich* man it is not lawful to retract therefrom, on a favourable conſtruction of the law, becauſe to acquire merit in the ſight of GOD may ſometimes be the object in beſtowing alms upon the rich.—In the ſame manner alſo, if a perſon make a *gift* of any thing to a poor man, it is not lawful to retract it, becauſe the object in ſuch gift is *merit*, and that has been obtained.

Diſtinction between votive vows of *Mál* and *Milk*, in alms.

IF a perſon vow to devote his *property* [*Mál*] in charity, let him give of that kind on which it is incumbent upon him to pay *Zakát*.—If, on the other hand, he vow to devote his *poſſeſſions* [*Milk*,] he muſt give the *whole* of his property.—It is related that there is no difference between theſe two caſes.—We have, however, in treating of the duties of the *Kâzee*, ſhewn the difference between *Mâl* and *Milk*; and alſo the principles on which both theſe traditions proceed.—It is to be obſerved that, in this caſe, the perſon that made the vow muſt be told to reſerve for himſelf and his family as much of his property as may ſuffice for their maintenance until he be able to acquire more. The remainder, after ſuch reſervation, muſt be beſtowed in charity; and after he has acquired more, he muſt then give in charity a portion equal to what he had reſerved for the ſubſiſtence of himſelf and his family.—An explanation of this has already been given in treating of inheritance, under the head of *duties of the* KÂZEE.

HEDÀYA.

BOOK XXXI.

Of IJÀRÁ, or HIRE.

Definition of the terms uſed in hire.

IJÀRÁ, in its primitive ſenſe, ſignifies a ſale of uſufruct; namely, a ſale of certain uſufruct for a certain hire, ſuch as *rent* or *wages*. In the language of the LAW it ſignifies a contract of uſufruct for a return.—(Analogy is repugnant to the validity of hire, as the thing contracted for, namely, the uſufruct, is a non-entity; and the refering an inveſtiture to a thing which is *forthcoming* is invalid.—The contract in queſtion is however valid; becauſe mankind ſtand in need of ſuch contracts; and alſo, becauſe the prophet has ſaid, "*Pay the* "*hireling his wages before the ſweat has dried from his brow*;" and alſo, "*If a perſon hire another, let him inform him of the wages he is* "*to* "*to receive.*"—The hirer or the leſſee is termed *Ajir*, or *Mâwjir*; and the leſſor, or the perſon who receives the wages or rent, is denominated the *Mooſtâjir*.

Chap. I. Introductory.
Chap. II. Of the Time when the Hire may be claimed.
Chap. III. Of Things the Hire of which is unlawful or otherwiſe;—and of diſputed Hire.
Chap. IV. Of invalid Hire.
Chap. V. Of the reſponſibility of a Hireling.
Chap. VI. Of Hire on one of two Conditions.
Chap. VII. Of the Hire of Slaves.
Chap. VIII. Of Diſputes between the Hirer and the Hireling[*].
Chap. IX. Of the Diſſolution of Hire.

CHAP. I.

The uſufruct and the hire muſt be particularly ſpecified.

A CONTRACT of hire is not valid unleſs both the uſufruct and the hire[†] be particularly known and ſpecified, becauſe of the ſaying of the prophet, "*If a perſon hire another, let him inform him of the wages he is to receive.*"

---

[*] The former of theſe terms is remarkably ambiguous in our language. It ſometimes ſerves to expreſs *the perſon who lets to hire*, as we ſpeak of a man who hires horſes. For the ſake of accuracy, however, the tranſlator has uniformly, in this treatiſe, employed the word "hirer," to expreſs the perſon who engages the ſervice of another, or the uſe of any article, as we commonly mean when we ſpeak of a perſon who hires a ſervant, &c.

[†] Arab. *Ujará*; meaning the wages, rent, recompence, &c. according to the ſubject to which it applies.

Objection.—It would appear, from that ſaying, that a knowledge of the *hire* alone is requiſite, not a knowledge of the *uſufruct*.

Reply.—The uſufruct is the ſubject of the contract, and the hire the thing contracted for.—Now the *ſubject* is the principal in a contract, and the thing contracted for the dependant: as therefore a knowledge of the *dependant* (namely the hire) is requiſite, it follows that a knowledge of the *principal* is requiſite *a fortiori*:—conſequently a knowledge of the *uſufruct* is eſtabliſhed, from the tradition in queſtion, by inference;—and alſo, becauſe ignorance with reſpect to the ſubject of the contract, and the return, tends to excite contention, in the ſame manner as ignorance with reſpect to the price and the article in a contract of ſale.

The hire (or recompence) may conſiſt of any thing capable of being *price*.

Whatever is lawful as a price, is alſo lawful as a recompence in hire; becauſe the recompence is a price paid for the uſufruct, and is therefore analogous to the price of an article purchaſed.—All articles, moreover, which are incapable of conſtituting price, (like things not of the deſcription of *ſimilars*, ſuch as a ſlave, or cloth,) are nevertheleſs a fit recompence in hire, ſince thoſe conſtitute *a return conſiſting of* PROPERTY.

The extent of the uſufruct may be defined by fixing a term,

The extent of uſufruct may be defined by fixing a term; as in the hire of a houſe for the purpoſe of reſidence, or the hire of land for the purpoſe of cultivation.—A contract of hire, therefore, ſtipulated for a certain term, to whatever extent, is valid; becauſe, upon the term being known, the extent of the uſufruct for that term is alſo known. This proceeds on a ſuppoſition of the uſe not being various.—Where, however, the uſes to which the article is to be applied are various, the uſufruct cannot be aſcertained by the mere declaration of a term; as in the caſe, for inſtance, of hiring ground, for a certain term, for the purpoſe of cultivation, which contract is invalid unleſs it expreſs the particular ſpecies of cultivation, ſince ſome modes of tillage are injurious to the land, and others are not ſo.—It is to be obſerved that the expreſſion of our author "for whatever term," denotes that hire is valid, whether it be for a long or a ſhort term, as the term is aſcertained, and men, moreover, frequently require a long term. If, however, the *Mootwalee* [procurator] of a charitable appropriation let out the appropriated article, the hire of it for any *long* term is made unlawful, leſt the leſſee might be enabled to advance a claim of right to it.—Hire for a *long* term, ſignifies for any term beyond three years. This is approved.

or (in hiring *ſervants*, &c.) by ſpecifying the work to be performed,

Usufruct may alſo be aſcertained by a ſpecification of work, as where a perſon hires another to dye or ſew cloth for him, or an animal for the purpoſe of carrying a certain burden, or of riding upon it a certain diſtance,—becauſe, upon ſhewing the cloth, and mentioning a particular colour, and the degree of the dying (ſuch as dipping *once* or *twice*, for inſtance) in the firſt caſe,—or explaining the nature of the needlework (ſuch as whether it is to be after the *Perſian* or *Turkiſh* faſhion) in the ſecond caſe,—or explaining the weight and nature of the load in the third caſe,—or the length of the journey in the fourth caſe,—the uſufruct is fully aſcertained; and the contract is conſequently valid.—It moreover frequently happens that a contract of hire is a contract for work, as in the caſe of hiring a fuller or a taylor, where it is requiſite that the work be particularly ſpecified. It is alſo ſometimes a contract for *uſufruct*, as in the caſe of hiring a domeſtic ſervant; and in this caſe a ſpecification of the term is requiſite.

or by ſpecification and pointed reference.

Usufruct may alſo be aſcertained by ſpecification and pointed reference; as where a perſon hires another to carry ſuch a particular load to ſuch a particular place; becauſe, upon ſeeing the load and the place to which it is to be carried, the ſervice to be performed is preciſely aſcertained; and the contract is conſequently valid.

CHAP. II.

Of the Time when the Hire may be claimed.

Hire can only be claimed in virtue of an agreement, or in conſequence of the end of the contract being obtained,

HIRE is not due immediately on concluding the contract, but becomes claimable on one of three grounds; for it is claimable in *advance*, in virtue of a previous agreement,—or in advance, independent of ſuch agreement,—or, in conſequence of the hirer obtaining the thing contracted for *. *Shafeï* maintains that it becomes a property immediately upon the concluſion of the contract; becauſe a non-exiſtent uſufruct is accounted exiſtent from the neceſſity of giving validity to the contract; and conſequently the effect (which is *right of property*) is eſtabliſhed with reſpect to the thing oppoſed to the uſufruct, namely, the conſideration or recompence.—The argument of our doctors is that a contract of hire is renewed every inſtant according to the occurrence of the uſufruct, as has been already explained.—Now the contract in queſtion is a contract of exchange, which requires that the conſideration and the return be equal. Hence, becauſe of the unavoidable delay attending the uſufruct, there muſt alſo be a delay with reſpect to the return for it, namely, the hire; but upon the uſufruct being obtained, a right of property takes place with reſpect to the hire, in order that equality may be eſtabliſhed;—and ſo alſo, where it is ſtipulated that the hire ſhall be in advance, or where it is paid in advance; becauſe equality was required on account of the right of the hirer, who, in this inſtance, foregoes his right.

The tenant becomes bound for the

UPON a tenant taking poſſeſſion of a houſe he becomes bound for the rent, although he ſhould not reſide therein; becauſe as it is impoſſible to make delivery of the *uſufruct*, the delivery of the ſubject from which the uſufruct is derived is a ſubſtitute for it; ſince in delivering the article an ability to enjoy the uſufruct is eſtabliſhed.—If, therefore, any perſon were to uſurp the houſe from the tenant, he [the tenant] is no longer reſponſible for the rent; becauſe a delivery of the *article* was admitted to be a ſubſtitute for a delivery of the *uſufruct* only, as this enabled the tenant to enjoy the uſufruct; but when the one no longer remains, the other ceaſes of courſe; and as the contract is thereby broken, the rent conſequently ceaſes.—If, alſo, a perſon uſurp the houſe at any time before the expiration of the term of the leaſe, the rent drops in proportion, ſince the contract is broken in that proportion.

---

* Namely, the *uſufruct*, *work*, or ſo forth.

rent by a delivery of the houſe, &c. to him, ſo long as it is not *uſurped* from him.

IF a perſon hire a houſe, the leſſor is at liberty to demand the rent from the tenant from day to day, becauſe the object was *daily uſe*, and that has been obtained: the leſſor may therefore inſiſt upon his rent from day to day, unleſs the time for claiming the rent be ſpecified in the contract, as if that were to expreſs that "the rent ſhall be "paid at ſuch a time,"—or, "at the expiration of ſuch a month,"—ſince this amounts to a ſtipulation of ready payment.—The ſame rule alſo obtains with reſpect to a leaſe of land, for the ſame reaſon.—In the ſame manner alſo, if a perſon hire a camel to *Mecca* (for inſtance,) the owner is at liberty to inſiſt upon the hire ſtage by ſtage, becauſe the object was *to travel by ſtages*.—What is here advanced is an opinion which was ſubſequently adopted by *Haneefa*. He was at firſt of opinion that the rent is not due, in the former inſtance, until the expiration of the term; nor the hire, in the latter, until the end of the journey; (and ſuch is the doctrine of *Ziffer*;) becauſe, as the object of the contract is the *whole* of the uſufruct within the time or journey ſpecified, it follows that the hire cannot be ſeparately applied to ſeparate portions of it;—in the ſame manner as where the object of the contract is *labour*, by a perſon hiring a *taylor* (for inſtance) to ſew his garment.—The reaſon for the laſt opinion of *Haneefa* is that analogy

If it be not otherwiſe ſpecified in the contract, rent may be demanded from day to day;

or the hire of an animal (upon a journey) from ſtage to ſtage.

Digitized by Google

analogy requires that the hire be demanded from inſtant to inſtant, in order that equality may be eſtabliſhed. If, however, the demand were admitted every inſtant, it would follow that the hirer or leſſee would be perpetually employed in paying the hire, without leiſure to attend to any thing elſe, which would be highly inconvenient and injurious to him.—For this reaſon, therefore, the proportion is determined at the rate of *one day*, in the hire of a houſe or land,—and at *one ſtage*, in the hire of a quadruped.

A workman is not entitled to any thing until his work be finiſhed.

A WORKMAN is not at liberty to demand his hire until his work be finiſhed, unleſs an advance of payment were ſtipulated; becauſe ſome of the work ſtill remains unobtained, whence he is not entitled to his hire.—The ſame rule alſo holds if the workman perform his buſineſs in the houſe of his employer; for in this inſtance he is not entitled to his hire before his work is finiſhed, ſince ſome of his work ſtill remains unobtained, as has been mentioned above.—This is what occurs in the *Hedáya* upon this ſubject; and the ſame is alſo to be found in the *Tijreed.*—The compiler of the *Maheet* and *Kadooree* likewiſe mention the ſame.—It is, however, contrary to the *Mabſoot*, for there it is mentioned that "hire is due in proportion to labour;" and *Timoor Taſhee*, and others, have thus expounded the LAW in this particular.—Concerning this caſe, therefore, there are two opinions, as is mentioned in the *Jama Ramooz.*—If an advance of hire be ſtipulated in the agreement, the workman is in ſuch caſe at liberty to require his pay before his work be finiſhed, as a ſtipulation of this nature, in a contract of hire, is binding.

Caſe of a baker hired to bake bread;

IF a perſon hire a baker to bake bread in his [the hirer's] houſe, at the rate of one *Kafeez* of flour for a *dirm*, the baker ſo hired is not entitled to his wages until he draw the bread out of the oven, ſince until this be done his work is not compleated. If, therefore, the bread be burnt, or fall out of his hands, and thus be ſpoiled, he is not entitled to his hire, becauſe of the deſtruction of the bread before delivery

livery of it to the hirer.—If, on the other hand, he draw the bread out of the oven, and it be afterwards burnt or otherwiſe deſtroyed, without his act, he is entitled to his hire, becauſe he has made a due delivery of it to the hirer, in virtue of having depoſited it in his houſe: neither is he, in this inſtance, liable to make any compenſation, as he has not been guilty of any tranſgreſſion.—The compiler of the *Hedáya* remarks that this is according to *Haneefa*, proceeding on the idea that the bread is a truſt in the baker's hands:—but that the two diſciples maintain that the hirer has it in his option to exact a compenſation for the value of the *flour* only; and that in this caſe he is not to pay the baker any part of his hire, ſince (as they hold) the bread is *inſured* with the baker, whence he is not exempted from reſponſibility until he duly deliver it to the hirer;—or, if he pleaſe, he may may exact a compenſation for the bread, paying the hire for the baking.

and of a cook;

IF a perſon hire a cook to prepare an entertainment, he [the cook] muſt alſo diſh the meat, as this is cuſtomary.

and of a brickmaker.

IF a perſon hire another to make him a certain quantity of bricks, he [the brickmaker] is entitled to his hire when he ſets up the bricks*, according to *Haneefa*.—The two diſciples hold that he is not entitled to his hire until he collect the bricks together and build them up, becauſe it is this which completes his work, ſince bricks are not ſecured from injury until they be ſo collected and built up:—the collecting them together, therefore, is analogous to drawing bread out of the oven.—Beſides, this is what is always cuſtomary with perſons hired for ſuch work; and cuſtom is regarded in every matter concerning which we have no expreſs ordinance.—The argument of *Haneefa* is that the work is completely finiſhed by ſetting up the bricks, the collecting them together and ſtacking them being an extra buſineſs, in the ſame manner as removal from one place to another; and accordingly people take bricks, to build with, from the place where they have been ſet up, without waiting for the *ſtacking* of them.—It is otherwiſe *before* they are ſet up, ſince the clay is not then hardened: and it is alſo otherwiſe with bread, as the uſe of that cannot be obtained until it be drawn out of the oven.

---

* The caſe here conſidered has a reference to the various ſtages of brick-making, and relates merely to *ſun*-dried bricks, the *burning* being a different trade.—The bricks are firſt molded; then, when *half* dried, ſet up on end; and when *completely* dried, built into ſtacks for uſe.

The article wrought upon may be detained by the workman until he be paid his hire;

Every artificer whoſe work produces a viſible effect upon an article (ſuch as a *dyer* or *fuller*) is at liberty to detain ſuch article until he receive his hire; becauſe in this inſtance the ſubject of the contract is deſcriptively exiſtent in the article, whence he is allowed to detain it with a view to receiving the return for ſuch ſubject, in the ſame manner as if it were an article of ſale;—in other words, as the ſeller is allowed to detain the article ſold until he receive the price, ſo alſo in the caſe in queſtion.—If, therefore, a dyer or fuller detain cloth for the purpoſe of being paid his hire, and the cloth periſh in his hands, he is not reſponſible, according to *Haneefa*, inaſmuch as he has not tranſgreſſed in ſo detaining it, the cloth remaining as a depoſit with him after detention, in the ſame manner as before.—He is not, however, in this caſe entitled to any hire, becauſe of the ſubject of the contract periſhing before delivery.—The two diſciples hold that the cloth is a ſubject of reſponſibility *before* detention, and ſo alſo *after* detention; but that the owner of the cloth has it at his option either to take a compenſation for the value of the cloth as it ſtood before the fulling or dying,—in which caſe the workman is not entitled to any pay,—or to take a compenſation for the value of it as it ſtood after the work,—in which caſe the workman is entitled to his hire.—This ſhall be more fully explained hereafter.

and he is not reſponſible, in caſe of accidents, during ſuch detention.

If the work be of a nature not to

A workman, the effect of whoſe labour is not viſibly extant in an article, (ſuch as a *boatman*, or a *porter*,) is not at liberty to detain the article with a view to receiving the hire; becauſe, in this inſtance, the ſubject of the contract is merely *labour*, which is in no manner exiſtent in the article conveyed or carried:—and the *waſhing* or *bleaching* of cloth is analogous to the *porterage* of it in this particular. From this analogy in regard to *waſhing* or *bleaching* it may be inferred that the term *fuller* [*Kiſſár*] in the preceding example, applies ſolely to one who uſes ſtarch, or ſuch other material; but, that where ſuch a perſon, in cleanſing cloth, makes uſe of things of no eſtimable value, ſuch as *water* and *ſunſhine*, he has not right of detention, ſince in ſuch caſe nothing remains that can be termed an effect from his labour, the whiteneſs being an original quality inherent in the cloth. *Kázee Khan* ſays, that if a fuller waſh cloth, and an effect be produced from his work by means of *ſtarch* (for inſtance,) he has a right of detention; but that if he merely whiten the cloth, there is in that caſe a difference of opinion. The approved doctrine, however, is that he has a right of detention in either caſe, becauſe the whiteneſs was a quality concealed in the cloth, and brought forth by his labour. This is different from the caſe of a *fugitive ſlave*; for the reſtorer is entitled to detain a fugitive ſlave with a view to his reward, notwithſtanding there be no viſible effect produced in the ſlave; the reaſon of which is, that the ſlave was in danger of being altogether loſt, and was preſerved only by the reſtorer bringing him back; whence he may be ſaid to *ſell* the ſlave to his owner, and conſequently, that he has a right of detention. What is here advanced is according to our three doctors. *Ziffer* maintains that a workman poſſeſſes no right of detention in either caſe; that is, whether the effect be exiſtent in the article, or otherwiſe;—becauſe, where his work is attended with an effect exiſtent in the article he has already made a delivery of the ſame to the hirer, as having blended it with his property; and a right of detention neceſſarily ceaſes upon delivery. Our doctors, on the other hand, argue that the workman, in blending the effect of his work with the hirer's property, has acted merely from neceſſity, ſince unleſs he were ſo to do it would be impoſſible to perform the work.

produce any viſible effect in the article, it cannot be detained.

This implication, therefore, does not infer that the workman intends or deſigns a delivery; and hence his right to detention does not ceaſe; in the ſame manner as where, in a ſale, the purchaſer takes poſſeſſion of the merchandiſe without the ſeller's conſent; in which caſe the ſeller's right of detention with a view to receiving the price, does not ceaſe; and ſo alſo in the caſe in queſtion.

A workman, if the contract be reſtricted to *his* work, cannot employ any other perſon.

If the hirer ſtipulate with the workman that he ſhall himſelf perform the work, he [the workman] is not at liberty to employ any other perſon; becauſe the ſubject of the contract is the work of *this* perſon and not of any *other*, and therefore the right of the hirer is connected with *his* work in particular, in the ſame manner as the right of the perſon who hires a place or an article is connected with the uſe of that particular place or article. If, on the other hand, the work be abſolute, without any ſtipulation that the workman ſhall *himſelf* perform it, (as if a perſon were to ſay to a taylor "Make up this garment") the workman is at liberty to hire any other perſon to perform the work, as the right of the hirer, in this inſtance, is merely to *taylor's work*, which may be performed either by this or by any other taylor; in the ſame manner as the payment of a debt, which may be made either by the debtor himſelf, or by any other perſon.

SECTION.

Caſes in which (from an unavoidable accident) the contract cannot be completely fulfilled.

If a perſon hire another to go to *Baſra*, and bring his family thence, and this perſon accordingly go to *Baſra*, and there find ſome of the family dead, and bring away the remainder, he is entitled to his whole hire for the journey to *Baſra*, and to a hire for returning back in proportion to the number he brings with him; becauſe, as he

Digitized by Google

he has performed a *part* of his contract, and not the *whole*, it follows that he is entitled to an equivalent for what he performs, and that his right is annulled in proportion to what he does not perform. The compiler of the *Hedáya* remarks that this proceeds upon a ſuppoſition of the number of the family being previouſly aſcertained, ſo as to oppoſe the hire agreed upon to the whole; for otherwiſe the whole hire is due. This rule, moreover, obtains only where the expences of the remainder are materially leſſened by the death of ſome; for if the expence of the whole be not thereby diminiſhed, (as where thoſe who died were not grown up, but yet able to travel on foot,) the perſon in queſtion is ſtill entitled to his whole hire.

IF a perſon hire another to carry a letter to *Baſra* and bring back an anſwer, and he accordingly go to *Baſra*, and there find the perſon dead, to whom the letter is addreſſed, and come back and return the letter, he is not entitled to any wages whatever. This is according to the two diſciples. *Mohammed* maintains, that he is to receive the uſual hire for going to *Baſra*, ſince in ſo doing he has performed a part of the contract, namely, the journey; the reaſon of which is that the hire or recompence is in lieu of the *journey*, as it is *that* which is attended with labour, not the carriage of the letter. The argument of the two diſciples is, that the carriage of the letter is the thing contracted for; either becauſe that is the deſign, (the letter being intended as a compliment to the perſon to whom it is addreſſed,) or becauſe the carriage of the letter is a means of accompliſhing the deſign of it, namely, a communication of its contents. The title to wages, therefore, depends upon the carriage of the letter: but, upon the meſſenger returning the letter, the contract is broken, and his claim to wages conſequently ceaſes;—in the ſame manner as in the next following example concerning wheat. If, however, in the caſe in queſtion, the meſſenger leave the letter at *Baſra*, and return, he is entitled to a hire for the journey thither, according to all our doctors, ſince what was contracted for has been in part performed in this inſtance.

If a perſon hire another to carry wheat to a certain perſon at *Baſra*, and he accordingly carry the wheat to *Baſra*, and then find the perſon dead to whom it was conſigned, and he bring back and return the wheat to the hirer, he is not entitled to any thing whatever, according to all our doctors, as he has failed in the performance of what he had contracted for. It is otherwiſe (according to *Mohammed*) in the caſe of the *letter*, becauſe in that caſe (agreeably to his tenets) the *journey* was the thing contracted for, as has been already explained.

CHAP. III.

Of Things the Hire of which is unlawful or otherwiſe; and of diſputed Hire.

A houſe or ſhop may be hired without ſpecifying the particular buſineſs to be carried on in it,

It is lawful to hire a houſe or ſhop for the purpoſe of reſidence, although no mention be made of the buſineſs to be followed in it; becauſe, as the oſtenſible purpoſe to which it is to be applied is *reſidence*, this muſt be taken for granted; and reſidence does not admit of various deſcriptions. The contract in queſtion is therefore valid; and the leſſee is at liberty to carry on in the place any buſineſs he pleaſes, as the caſe is abſolute. A blackſmith, however, or a fuller or miller muſt not reſide in the houſe, as this would be evidently injurious, ſince the exerciſe of thoſe trades would ſhake the building. Although, therefore, the contract in queſtion be abſolute, ſtill it is virtually reſtricted to what may not be injurious to the building.

unleſs it be of a nature injurious to the building.

It

In a leaſe of *land*, the renter is entitled to the uſe of *road* and *water*:

It is lawful to hire land for the purpoſe of cultivation, as this is the uſe to which land is commonly applied. In this caſe alſo, the hirer is entitled to the uſe of the road leading to the land, and likewiſe to the water (that is, to his turn of watering) although no mention of theſe be made in the contract; becauſe land is hired with a view to the uſe of it, which cannot be obtained without a right to road and water:—both are therefore included, although no mention of them be made at the time of concluding the contract:—in oppoſition to a caſe of *ſale*; for in that inſtance a right to road and water is not included unleſs particularly ſpecified, the end of ſale being *appropriation*, not *preſent uſe*; whence it is that it is lawful to *ſell* an aſs's colt, or ſaltpetre grounds, but not to *hire* them.

but the leaſe is not valid, unleſs the uſe to which it is to be applied be ſpecified.

A lease of land is not valid unleſs mention be made of the article to be raiſed in it; becauſe land is hired, not only with a view to cultivation, but alſo for other purpoſes, ſuch as building, and ſo forth; moreover, the articles ſown in the land may be of different qualities, ſince ſome vegetables come quickly to maturity, whilſt others are ſlower of growth. It is therefore requiſite that the article be ſpecified, to avoid diſputes between the leſſor and leſſee; or, that the leſſor declare "I let the land on this condition, that the leſſee ſhall "raiſe whatever he pleaſes in it," in which caſe, as the leſſor expreſſly leaves the leſſee at full liberty, the uncertainty which might occaſion a diſpute is removed.

At the expiration of the leaſe, the land muſt be reſtored in its original ſtate.

If a perſon hire unoccupied land, for the purpoſe of building or planting, it is lawful, ſince theſe are purpoſes to which land is applied. Afterwards, however, upon the term of the leaſe expiring, it is incumbent on the leſſee to remove his buildings or trees, and to reſtore the land to the leſſor in ſuch a ſtate as may leave him no claim upon it, becauſe houſes or trees have no ſpecific limit of exiſtence, and if they were left upon the land it might be injurious to the proprietor. It is otherwiſe where land is hired for the purpoſe of tillage, and the term of the leaſe expires at a time when the grain is yet unripe; for in ſuch caſe the grain muſt be ſuffered to remain upon the land, at a proportionable rent, until it be fit for reaping, becauſe, as the time *that* may require is limited and aſcertainable, it is poſſible to attend to the right of both parties. In the caſe, on the contrary, of trees or buildings, it is impoſſible to pay attention to the right of both parties; and it is therefore incumbent on the leſſee to remove his trees or houſes from the land;—unleſs the proprietor of the ſoil agree to pay him an equivalent, in which caſe the right of property in them devolves to him; (ſtill, however, this cannot be, without the conſent of the owner of the houſes or trees; except where the land is liable to ſuſtain an injury from the removal, in which caſe the proprietor of the land is at liberty to give an equivalent, and appropriate the trees or houſes without the leſſee's conſent;)—or unleſs the proprietor of the land aſſent to the trees or houſes remaining there, in which caſe they continue to appertain to the leſſee, and the land to the landlord; for as the right of removing them belongs to the landlord, he is at liberty to forego that right. It is written in the *Jama Sagheer* that if the term of the leaſe be expired, and the land be occupied by pulſe or other garden ſtuffs, thoſe muſt be removed; becauſe as thoſe have no fixed term of exiſtence, they are therefore analogous to trees.

An *abſolute* contract leaves the hirer at liberty to give the uſe to any perſon:

THE hire of an animal is lawful, either for carriage or for riding, as to thoſe uſes animals are applied. If, therefore, the riding be abſolutely expreſſed, the hirer is at liberty to permit any perſon he pleaſes to ride upon the animal, becauſe of the riding being contracted for in an *abſolute* manner. Upon the hirer, however, either mounting the animal himſelf, or admitting another to ride on it, he is not at liberty to ſet any perſon on it beſides, becauſe the actual object of the contract is then aſcertained and determined. Men, moreover, differ in their mode of riding, whence it in fact becomes the ſame as if the particulars of the riding had been expreſsly ſtipulated in the contract. In the ſame manner alſo, if a perſon hire a dreſs for the purpoſe of wearing it unreſtrictedly, and in an abſolute manner, he is at liberty either to wear it himſelf, or to give it to any other perſon to wear: but upon putting it on himſelf, or permitting another ſo to do, he is not at liberty to clothe any one in it beſides.

IF a perſon let a quadruped to hire, on condition that a particular perſon ſhall ride upon it, or let a dreſs to hire, on condition that a particular perſon ſhall wear it,—and the hirer ſet upon the quadruped ſome other than the perſon ſpecified, or give the dreſs to ſome other perſon to wear, and the quadruped or dreſs be deſtroyed, he [the hirer] is reſponſible; becauſe, as men differ in their manner of riding, and of wearing clothes, the ſpecification of a particular perſon is valid, and conſequently it is not lawful for the hirer to ſwerve therefrom. The ſame rule alſo obtains with reſpect to every thing liable to be differently affected by a different occupant: in other words, if the perſon who lets to hire reſtrict the uſe, it is reſtricted accordingly; and if the hirer ſwerve therefrom, he is reſponſible in caſe of the deſtruction of the article, for the reaſon above ſtated. *Land*, however, and every other article not liable to be differently affected by a different occupant, (ſuch as a *tent* or *pavillion*,) is not reſtricted in point of uſe by the mention of a particular perſon; and conſequently, the hirer is at liberty to put any one to reſide in it that he pleaſes, ſince the excluſive reſtriction is of uſe only becauſe of its preventing a difference of effect. But the reſidence of perſons whoſe buſineſs is of injurious tendency to a building, (ſuch as *blackſmiths*, and ſo forth) is always excepted from the contract, as was before explained.

but in a *reſtricted* contract, any deviation with reſpect to the uſe renders the hirer reſponſible for the article hired,

unleſs that be of a nature not liable to injury from ſuch deviation,

IF a perſon hire an animal to carry a burden, and the perſon who lets it to hire ſpecify the nature and quantity of the article with which the hirer is to load the animal,—as if he were to ſay, for inſtance, "You ſhall load it with five *Kafeezs* of *wheat*,"—the hirer is in this caſe at liberty to load the animal with an equal quantity of any

or, unleſs the deviation be not of a nature to injure the article.

any article not more troubleſome or prejudicial in the carriage than wheat, ſuch as barley, or rape-ſeed, as all articles of that deſcription are included in the permiſſion contained in the contract, becauſe of their not occaſioning any difference, or becauſe they may be even preferable to what was ſpecified in it, as being leſs prejudicial. The hirer, however, is not at liberty to load the animal with any article of a more prejudicial nature, in the carriage, than wheat, (ſuch as *ſalt*, for inſtance,) ſince to this the leſſor had not aſſented.

If a perſon hire an animal to carry a certain quantity of cotton, he is not at liberty to load the animal with a ſimilar quantity of iron, ſince it is highly probable that the carriage of the *iron* may be more prejudicial to the animal than the carriage of the *cotton*, for this reaſon, that the iron preſſes chiefly on one ſpot of the creature's back, whereas the cotton preſſes on it equally in all parts.

An exceſs in the uſe induces a proportionable reſponſibility in caſe of accident.

If a perſon hire an animal to carry a certain quantity of wheat, and load it with a greater quantity, and the animal periſh, he is reſponſible in the proportion of the exceſs load. Thus a perſon, for inſtance, hires an animal to carry ten *Kafeezs* of wheat, and loads him with fifteen *Kafeezs*, and the animal periſhes;—in which caſe he is reſponſible for one third of the value of the animal. The reaſon of this is that the animal in queſtion has periſhed in conſequence both of what has been permitted to the hirer, and alſo, of what has not been permitted; as, therefore, the deſtruction has been occaſioned by the *whole burden*, it is divided between both parts reſpectively; and accordingly, nothing is accounted upon the proportion allowed, but an indemnification is due upon the proportion *un*allowed. If, however, the hirer had overloaded the animal to a degree beyond what it was able to bear, he is, in this caſe, reſponſible for the *whole* of the value, ſince he was utterly unauthoriſed to act thus, as it is altogether unuſual to do ſo.

Digitized by Google

A rider, taking up an additional rider, incurs reſponſibility for half the value of the animal.

IF a perſon hire an animal for his own riding, and he take up another perſon behind him upon the animal, and the animal periſh, he is reſponſible for one half of the value.—No regard is paid to the *load* in this inſtance, becauſe a perſon who does not underſtand riding will hurt an animal's back, although he be of light weight, as, on the contrary, a complete rider ſits light on horſeback, although his perſon be heavy.—Beſides, a man is not an article of weight, whence his weight cannot be aſcertained; and accordingly regard muſt be paid to the *number* of the riders, in the ſame manner as, in offences againſt the perſon, regard is paid to the number of the offenders;—in other words, if one perſon accidentally give another *ten* wounds, and a ſecond perſon give him *one* wound, and the wounded perſon die, the fine of blood is due from both in equal ſhares.—What is here advanced proceeds on a ſuppoſition of the animal in queſtion being capable of carrying double; for if it be incapable of carrying double, the hirer is reſponſible for the whole value, in the ſame manner as in the caſe of *wheat*.—It is alſo to be obſerved that, in the ſame manner as this rule applies to *adults*, ſo does it likewiſe to *infants* capable of riding alone upon an animal: but if the hirer place behind him an infant incapable of riding alone, it is the ſame as goods or effects, and he is, in ſuch caſe, reſponſible only in proportion to the additional load.

An hired animal periſhing from ill uſage ſubjects the hirer to reſponſibility.

IF a perſon hire an animal for riding, and pull the halter, or beat the animal, ſo as to occaſion its death, he is reſponſible for the whole value, according to *Haneefa*. The two diſciples maintain that he is not reſponſible where he only pulls the halter or beats the animal in ſuch a degree as is cuſtomary, ſince every thing cuſtomary is included in the contract, and therefore the caſe is the ſame as if he were to perform thoſe acts by expreſs permiſſion of the owner, whence he is not reſponſible.—The argument of *Haneefa* is that the owner's permiſſion is reſtricted to the condition of ſafety, ſince an animal may be driven without either pulling the halter or beating it, both of theſe being an exceſſive and unneceſſary exertion: the uſe, therefore, is reſtricted to the condition of *ſafety*, in the ſame manner as the travelling upon the public highway.

In the hire or loan of animals, reſponſibility is induced by any deviation from the preſcribed journey.

If a perſon hire an animal to carry him to a particular place, (*Medina*, for inſtance,) and he go out of his way, and proceed to another place, and then return with the animal to *Medina*, and it die, he is reſponſible for it. The ſame rule alſo holds with reſpect to an animal *lent*.—Some have ſaid that this example proceeds upon a ſuppoſition of the animal being hired merely to *go* to *Medina*, (not to *go* and *return*,) in which caſe the hirer is not, in fact, required to reſtore it to the owner: but that where it is hired for the purpoſe both of *going* and *coming*, the hirer is in the ſame predicament with a truſtee who firſt ſwerves from the terms of his truſt, and afterwards accords to them, in which caſe he is not reſponſible for the depoſit in his hands.—Others, again, ſay that the rule is abſolute; and conſequently that reſponſibility attaches in either caſe; for there is an eſſential difference between a hirer or borrower, and a truſtee; becauſe the truſtee is directed to keep the depoſit, independantly, and conſequently the order for conſervation ſtill remains in force after the truſtee ceaſes from his deviation and reconforms to the terms of truſt, whence he reverts to his ſituation of repreſentative of the owner; whereas, in a caſe of hire or loan, the hirer or borrower are directed to keep the article dependantly of the *uſe*, and not *in*dependantly; and conſequently, upon the uſe ceaſing, they no longer continue repreſentatives of the owner; whence they are not diſcharged from reſponſibility by their return to *Medina*.—This is approved.

The change of a ſaddle for another of the ſame ſort does not induce reſponſibility,

If a perſon hire an aſs with its ſaddle, and faſten upon it another ſaddle, of the ſame ſort as is commonly uſed upon ſuch an aſs, he is not reſponſible if the aſs periſh; becauſe where the ſaddle is proportionate to the animal, the owner's aſſent extends to it, as the reſtriction is advantageous only in caſe of the other ſaddle being heavier than the one ſpecified in the contract, when, if the aſs were to periſh, the hirer would be reſponſible in proportion to the difference.—If, on the contrary, the hirer were to faſten upon the aſs a ſaddle of a ſort not commonly uſed upon ſuch an aſs, he is reſponſible for the whole value; for as this is not included in the leſſor's aſſent, it follows that the hirer, in ſo doing, acts contrary to engagement.

unleſs the *weight* be different, when reſponſibility attaches in proportion to the exceſs.

IF a perſon hire an aſs, with its ſaddle, and faſten upon the aſs a pack-ſaddle, of a ſort not commonly put upon ſuch an aſs, he is in this caſe reſponſible for the whole value of the animal, for the reaſon alleged in the example of the *ſaddle*; nay, the obligation reſts upon him in this caſe, *a fortiori*, ſince a pack-ſaddle or panniers are not of the ſame nature as a *riding*-ſaddle, and are, moreover, heavier. If, alſo, he faſten upon the aſs a pack-ſaddle of a ſort commonly uſed upon ſuch an aſs, he is reſponſible for the whole value, according to *Haneefa*.—The two diſciples allege that, in this inſtance, he is reſponſible only in proportion as the load of the pack-ſaddle exceeds that of the riding-ſaddle; becauſe, where the pack-ſaddle is of a ſort commonly put upon ſuch an aſs, it follows that the *riding*-ſaddle and the *pack*-ſaddle are equal, and conſequently that the owner of the aſs aſſents,—except the latter exceed the former in weight, in which caſe the hirer is reſponſible in proportion to the exceſs of weight, as to that the owner is not aſſenting.—The exceſs, therefore, in this inſtance, is analogous to a caſe where the perſon who lets out an animal to hire ſpecifies the quantity of wheat he is to carry, and the hirer loads it with a larger quantity.—The argument of *Haneefa* is that a pack-ſaddle is not in the nature of a common ſaddle:—it is not ſo in *appearance*, ſince it is more ſpread upon the animal on one ſide than on the other*; nor is it ſo in *reality*, ſince a pack-ſaddle is for carrying burdens, whereas a common ſaddle is for riding.—The hirer, therefore,

If the *nature* of the ſaddle be different, reſponſibility attaches *in toto*.

---

[*] This alludes to the particular faſhion of the *Palàn*, or *Perſian* pack-ſaddle, with which the tranſlator is unacquainted.

fore, in faſtening a pack-ſaddle upon the aſs, acts contrary to his engagement with the owner, in the ſame manner as a perſon who hires an animal to carry *wheat*, and loads it with *iron*.

A *porter* is not made reſponſible, by any immaterial deviation from the preſcribed road.

If a perſon hire a porter to carry a load of wheat to a certain place, by a particular road, and he take another frequented road, and the wheat be loſt, he is not reſponſible; and if he carry the wheat ſafe to the place, he is entitled to his hire.—This proceeds upon the ſuppoſition that the roads are not widely different, for in this caſe the reſtriction to either in particular is uſeleſs.—Where, however, the roads are widely different, that taken by the porter being dangerous or round about, or of difficult paſſage, the porter is reſponſible in caſe of the wheat being loſt, ſince the reſtriction is of uſe in this inſtance, and therefore valid.—It is to be obſerved that *Mohammed* does not make this diſtinction, but alleges that the porter is not reſponſible if he carry his load by any other than the road ſpecified, provided it be one commonly uſed; becauſe, where it is a beaten path, there is no apparent difference between the two.—If, on the contrary, he carry the load by an unfrequented road, and it be loſt, he is reſponſible for the value, as the reſtriction is valid, and the porter acted contrary to his inſtructions.—If, however, in this caſe, he carry the wheat ſafe to the place, he is entitled to his hire; becauſe upon ſo doing his deviation from his orders is rectified, and the end is obtained.

Any injurious deviation from the preſcribed culture of hired land induces a proportionable reſponſibility.

If a perſon hire land for the cultivation of wheat, and ſow therein trefoils or clover, he is reſponſible in proportion to the damage the land ſuſtains, becauſe the cultivation of any ſpecies of graſs * is more injurious to the land than the cultivation of wheat, as thoſe require more water, and their roots ſpread more in the ground.—In this inſtance, therefore, the leſſee has acted contrary to his agreement with the leſſor, inaſmuch as he had done a thing more injurious to the land than what the leſſor had ſpecified.—But if the leſſor require this compenſation, he is not entitled to any rent, as the leſſee in that caſe ſtands as an uſurper, becauſe of his acting contrary to engagement, as before explained.

---

* The term, in the original, is *Ràtbá*, which applies to all the more ſucculent ſpecies of field herbage.

A *taylor* is reſponſible for deviating from his orders.

If a perſon deliver a piece of cloth to a taylor, directing him to make it into a *Peeràbin*, or ſhirt, for a particular hire, and he make it into a *Kàbbá*, or ſhort veſt, the perſon has it in his option either to take a compenſation from the taylor for his cloth, or to receive the *Kàbbá*, paying him an adequate hire, which, however, is not to exceed what had been at firſt agreed upon.—This is according to the *Zâhir Rawâyet*.—Some have ſaid that the *Peeràbin* is merely a *Kàbbá*, or veſt, of one fold.—Others, again, ſay that the *Peeràbin* is not particularly reſtricted to a veſt of one fold, as both are uſed indiſcriminately at all ſeaſons.—It is reported, from *Haneefa*, that the proprietor of the cloth is to take a compenſation from the taylor, and that he has no option of any thing elſe; becauſe, as the *Kàbbá* is a ſpecies of apparel totally different from the *Peeràbin*, the taylor ſtands in the predicament of an uſurper.—The reaſon of the doctrine, as reported from the *Zâhir Rawâyet*, is that the *Kàbbá* is in one ſhape a *Peeràbin*, as it is occaſionally uſed inſtead of the *Peeràbin*, and in another view it is not ſo.—Hence there is both a ſimilitude and a diſſimilitude; and accordingly the proprietor of the cloth has it at his option to take a compenſation for the value, (in which caſe the cloth becomes the property of the taylor,) or, to take the *Kàbbá*, paying an adequate hire:—an *adequate* hire only is due, becauſe the taylor has not compleatly fulfilled his agreement; and it muſt not exceed what was at firſt agreed upon, as obtains in all caſes of invalid hire.

If a perſon deliver a piece of cloth to a taylor, directing him to make it into a *Kàbbá*, and he make it into a *Shilwar*, or drawers, ſome allege that the proprietor muſt accept a compenſation; and that he has no other option, becauſe of the different uſes to which thoſe two ſorts of apparel are applied.—It is certain, however, that the proprietor has it at his option, in this inſtance, either to take a compenſation for the value of his cloth, or to take the *Shilwar*, paying an adequate hire; becauſe the uſe, namely clothing and covering nakedneſs, is the ſame in both; and the caſe is therefore analogous to where a perſon orders a brazier to "make him a diſh of this braſs," and the brazier makes him a brazen plate, in which inſtance the proprietor of the braſs has an option, and ſo alſo in the caſe in queſtion.

CHAP. IV.

Of *invalid* Hire.

An invalid condition invalidates hire;

HIRE is rendered invalid by involving an invalid condition, in the ſame manner as ſale, for hire ſtands in the place of ſale, whence it is that a contract of hire may be diſſolved in the ſame manner as a contract of ſale.

but a *proportionate* hire is in ſuch caſe due, to the extent of the hire ſpecified.

IN a caſe of hire rendered invalid by involving an invalid condition, a *proportionate* hire is due where that does not exceed the hire ſpecified in the contract,—in other words, of the ſpecified hire and the proportionate hire, the ſmalleſt is due.—*Ziffer* maintains that a proportionate hire is due, to whatever amount it may extend; for he conceives an analogy between the caſe in queſtion and a caſe of invalid ſale, in which the *value* of the article is due, to whatever amount.—The argument of our doctors is that uſufruct cannot be appreciated but by a contract entered into to anſwer the neceſſity of mankind, whence, in *valid* hire, the degree is meaſured by the neceſſity.—As, however, invalid hire is a dependant of a contract of valid hire, it has a relation to a valid contract, and conſequently regard is paid in it to what may be the cuſtomary recompence in valid hire, which is a *proportionate* hire.—Now the parties, in a caſe of invalid hire, having agreed upon a ſpecific amount, it follows that both, in making ſuch ſpecification, agree to remit whatever may be beyond the ſpecified hire, where that is exceeded by the proportionate hire: in this caſe, therefore, the ſpecified hire is due:—but if, on the other hand, the proportionate hire *fall ſhort* of the ſpecified hire, the exceſs of the ſpecified hire is not due, as the ſpecification itſelf was invalid.—It is otherwiſe in an invalid ſale; for as an article of ſale is appreciable to its extent, there is no neceſſity for a regard to the contract in order to manifeſt its value. Now this value is the *original* thing: if, therefore, the ſpecification of a price be valid, (as in a caſe of valid ſale) the effect paſſes from the original thing to the ſaid price; but if, on the contrary, the ſpecification of a price be invalid, (as in a caſe of invalid ſale,) the effect does not paſs from the original thing to the price.

A contract indefinitely expreſſed cloſes at the expiration of the firſt term.

IF a perſon hire a houſe, on a condition thus expreſſed, that "he "ſhall pay one *dirm* every month," ſuch contract is valid for one month, but invalid for every ſubſequent month, unleſs the whole of the months for which it is to be hired be ſpecified, in which caſe it continues valid.—The arguments on which this is founded are drawn from the conſtruction of the words in the *Arabic* idiom.—It is to be obſerved that as the contract in queſtion is valid for one month only, it belongs to both the leſſor and leſſee, reſpectively, to diſſolve the contract at the end of the month, as the *valid* contract is then complete and finiſhed.—If, therefore, in this inſtance, the leſſee, after the

Digitized by Google

the expiration of the ſaid month, continue in the houſe for a ſingle inſtant of the ſecond, the contract remains in force for the ſecond month, nor is the leſſor at liberty to put out the leſſee until the end of this month; (and the ſame rule holds with reſpect to every month in the beginning of which the leſſee continues to occupy the houſe;) becauſe the contract appears to be renewed, with the conſent of both parties, in virtue of the leſſee ſtill continuing to occupy the houſe in the ſucceeding month.—This, however, proceeds merely upon analogy; and has been adopted by ſome of our modern doctors.—According to the *Zâhir Rawâyet*, an option of diſſolution remains in the next month, to either party, to the end of the firſt day of the month; for in having regard to the very firſt *inſtant* only of that month, a reſtriction is induced ſo narrow as not to admit the exerciſe of an option.

Rules with reſpect to *annual* leaſes.

If a perſon hire a houſe for a year, at the rate of twelve *dirms*, it is lawful, although no mention be made of the rent of each month reſpectively; becauſe, as the whole term of the leaſe is known without diviſion, it is therefore the ſame as hiring for a ſingle month, which is lawful, although no mention be made of the rent of each day reſpectively.—It is to be obſerved that if the day of the year's commencement be ſpecified (as if the leſſee were to ſay "I take this "houſe, for a year, from the firſt of the month *Ràjàb*,") the leaſe commences from that date.—If, on the contrary, no date of commencement be ſpecified, the leaſe commences from the date of the deed itſelf; becauſe all dates are equal with reſpect to hire, and therefore a leaſe in this particular reſembles a vow; in other words, if a perſon make a vow that "he will not *ſpeak* (for inſtance) to a particular perſon for one month," the obſervance of his vow commences upon the inſtant of expreſſing it, all dates being equal with reſpect to vows; and ſo alſo in the caſe in queſtion.—It is alſo to be obſerved, that if, in this inſtance, the contract of hire be concluded on the firſt day of the month, all the ſucceeding months of the year are counted from the appearance of the new moon, as this is the original ſtandard of calculation.—If, on the contrary, the contract be concluded after the lapſe of ſome days from the commencement of a month, the leaſe is in that caſe for three hundred and ſixty days, according to *Haneefa*; and there is one report from *Aboo Yooſaf* to the ſame effect.—According to *Mohammed*, and another report of *Aboo Yooſaf*, the firſt month is to be counted by days, to be completed from the next ſucceeding month; and the other months muſt be counted from the appearance of each new moon; becauſe a calculation by the number of days is admitted purely from neceſſity, which exiſts in the firſt month only.—The argument of *Haneefa* is that upon the firſt month being completed by the deduction of a certain number of days from the ſecond, that alſo muſt, from neceſſity, be counted by days; and ſo of the reſt to the end of the year;—in the ſame manner as obtains with reſpect to the *Edit*;—that is to ſay, if a divorce take place in the middle of a month, it muſt be counted by days; and ſo alſo in the preſent inſtance.

Wages are due to *keepers* of baths and *cuppers*;

Keepers of baths and cuppers are lawfully entitled to wages:—the former, becauſe it is an invariable cuſtom, among all *Muſſulmans*, to pay them wages, and the prophet has ſaid "*Whatever ſeems good* "*unto the body of the* Mussulmans *is alſo good before* God;"—and the latter, becauſe the prophet paid a recompence to a perſon who performed the operation of cupping upon him; and alſo, becauſe this is a certain recompence for a certain ſervice, and is therefore lawful.

but there is no hire for the covering of *mares*, &c.

There are no wages for the *covering* of animals,—that is, for bringing a male to copulate with a female; becauſe the prophet has ſaid "Assib-tees *is among the things prohibited*;" and by *Aſſib-tees* is underſtood the recompence for the copulation of a *ſtallion*, or ſo forth.

nor for the performance of any *religious* duty;

It is not lawful to accept a recompence for ſummoning the people to prayers, or for the performance of a pilgrimage, or of the duties of an *Imâm*, or for teaching the KORAN, or the LAW; for it is a general rule, with our doctors, that no recompence can be received for the performance of any duty purely of a *religious* nature.—According to *Shafeï*, it is allowed to receive pay for the performance of any religious duty which is not required of the hireling in virtue of a divine ordinance, as this is only accepting a recompence for a certain ſervice; and as the acts above deſcribed are not *ordained* upon the hireling, it is conſequently lawful to receive a recompence for them.—The arguments of our doctors upon this point are twofold.—FIRST, the prophet has ſaid, "*Read the* KORAN, *but do not receive any recompence for* "*ſo doing*:" and he alſo directed *Othman-bin-Abeeyàs*, that if he were appointed a *Màwzin* [a cryer to prayer] he ſhould not take any wages. SECONDLY, where an act of piety is performed, it ſprings ſolely from the performer, (whence regard is had to *his* competency,) and conſequently he is not entitled to any recompence from another, as in the caſes of *faſting* or *prayer*.—A teacher of the KORAN, moreover, is incapable of inſtructing another in it, but by means of qualities exiſting in his ſcholar, namely capacity and docility, and therefore undertakes a thing the performance of which does not depend upon himſelf, which is conſequently invalid.—Some of our modern doctors, however, hold it lawful to receive wages for teaching the KORAN in the preſent age, becauſe an indifference has taken place with reſpect to religion, whence if people were to withhold from paying a recompence for inſtruction in the ſacred writings, they would in time be diſregarded;—and decrees paſs accordingly.

nor for ſinging or lamentation.

It is not lawful to receive wages for ſinging, or lamentation*, or for any other ſpecies of public exhibition, as this is taking a recompence for an act which is of a criminal nature, and acts of that nature do not entitle to a recompence in virtue of a contract.

---

* Arab. *Noohá*. Crying over the dead, (by female mourners, who make it a profeſſion.)

Hire of *indefinite* articles.

THE hire of any thing indefinite is invalid, according to *Haneefa*, unleſs from a partner.—The two diſciples maintain that ſuch hire is valid;—and decrees paſs accordingly.—(This rule chiefly applies to ſuch caſes as where, for inſtance, a perſon lets a ſhare or portion of his houſe to another, or lets his own ſhare in a partnerſhip-houſe to any other than his partner.)—The argument of the two diſciples is that an indefinite part is capable of being uſed, (whence a proportionate hire is due,) and the delivery of it is practicable, either by the leſſor vacating his ſhare to the leſſee, or by agreeing to hold it with him alternately.—The caſe is therefore the ſame as if he were to let it to a partner, or between two, which would be valid: conſequently this reſembles a caſe of *ſale*.—The argument of *Haneefa* is that as the leſſor, in this inſtance, lets to hire an article which he is incapable of delivering, the deed is conſequently invalid.—The ground of this is that the delivery of an indefinite part of any thing is inconceivable; becauſe delivery cannot be completely executed on one part without ſeizin on the other; and ſeizin, as being a perceptible act, cannot take place but upon a ſpecific ſubject.—With reſpect to *evacuation*, it is regarded as a delivery, becauſe it amounts to inveſtiture, an act through which occupancy, or, in other words, a power of ſeizin, is obtained. With reſpect to *alternate occupancy*, on the other hand, that cannot be eſtabliſhed but in virtue of a right of property in the uſe, which is an effect of the contract of hire. Now as the *effect* of any thing muſt be ſubſequent to that thing, it follows that the alternate occupancy is ſubſequent to the execution of the contract of hire: but ability to make delivery is one condition of the contract; and as the condition to a thing muſt precede that thing, it follows that the ability to make a delivery muſt precede the contract of hire. A thing, however, which is ſubſequent cannot be conſidered as antecedent; and hence the alternate occupancy, which is ſubſequent, is incapable of

being

Digitized by Google

being accounted a *delivery*.—Where, on the contrary, the leaſe is to a *partner*, the *whole* uſe ariſing from the article becomes the property of the leſſee, and conſequently no part of what he holds can be termed *indefinite*: neither is the difference in the nature of the uſufruct (from part of it being in virtue of right of property, and part of it in virtue of a leaſe) injurious to the leſſee in this inſtance.—Beſides, the hire of an indefinite ſubject is unlawful from a *partner* alſo, (according to an opinion of *Haneefa*, as reported by *Haſan*.)—It is otherwiſe in a caſe of *ſupervenient* indefiniteneſs, as that does not occaſion contention. (A *ſupervenient* indefiniteneſs is where a perſon lets an article to two perſons, and one of the leſſees dies,—or where two perſons let an article to one perſon, and one of the leſſors dies,—in which caſe the leaſe continues in force with reſpect to the other's ſhare, indefinitely, and does not become invalid, according to the *Zahir Rawâyet*, for this reaſon, that ability to make delivery is not a condition merely becauſe of the contract, but becauſe of the obligation of delivery,—which obligation exiſts in the beginning, not afterwards, whence the ability of delivery is not a condition in the *continuance*.) It is alſo otherwiſe where an article is let to *two* perſons, becauſe in this inſtance a delivery of the *whole* is eſtabliſhed, after which an indefinite diviſion ſupervenes, becauſe of the right of property of each party being ſeparate.

Hire of a *nurſe*.

It is lawful to hire a nurſe to ſuckle a child, at a certain rate of wages; becauſe God has ſaid in the Koran, "IF THEY SUCKLE "YOUR CHILDREN, PAY THEM THEIR HIRE;" and alſo, becauſe, in the time of the prophet, ſuch was the practice,—and likewiſe both *before* and *ſince* his time.—Some have ſaid that the contract of hire, in the caſe in queſtion, is a contract for *ſerving* the infant, the particulars of ſuch ſervice (namely attendance and milk) following as dependants, in the ſame manner as the colour in a contract for dying cloth.—(Others maintain that the contract is a contract for the *milk*, the attendance following as a dependant: and accordingly, if a goat be hired to give milk to an infant, no recompence is due.—The former opinion, however, is more conformable to LAW; becauſe contracts of hire are not concluded for deſtruction or expenditure of an actually exiſtent article; as where, for inſtance, a perſon hires a cow for the purpoſe of uſing her milk, which is invalid, as ſhall be ſhortly ſhewn in its proper place.)—Such, therefore, being the caſe, the contract in queſtion is valid, provided the rate of hire be ſpecified, conſidering it as hiring a perſon for the ſake of her *attendance.*

IT is lawful to hire a nurſe to ſuckle an infant in return for meat and clothing, on a favourable conſtruction, according to *Haneefa.*—The two diſciples maintain that this is not lawful, becauſe as the recompence is indeterminate and unknown, the caſe is therefore the ſame as if the woman were hired to bake bread, or ſo forth, in return for her meat and clothing.—The argument of *Haneefa* is that the indeterminateneſs in queſtion is not likely to engender ſtrife, ſince it is cuſtomary to feed nurſes in a liberal manner, with a view to render them kind and tender to the children under their care.—This caſe, therefore, reſembles the ſelling of a meaſure of wheat out of a heap, which is lawful, although the ſeller be at liberty to give the wheat from whatever part of the heap he pleaſes, as an ignorance in that particular does not engender ſtrife.—It is otherwiſe in the caſe of hiring a woman to bake bread, or the like, becauſe an ignorance in that inſtance is calculated to occaſion contention.—What is here advanced proceeds upon a ſuppoſition that no explanation has been given concerning the quantity or quality of the food and clothing agreed for to the nurſe.—It is written in the *Jama Sagheer* that if a nurſe be hired to ſuckle a *child* for her victuals and clothing,—in this way, that an explanation be given of the kind and faſhion of her apparel, and the time of giving it, and a ſpecific number of *dirms* appointed for her board,—and victuals be afterwards given in lieu of the money, it is lawful according to all, becauſe in this caſe there is no ignorance.—Or, if the victuals be ſpecified, and the quantity and quality explained, this alſo is lawful, for the ſame reaſon; and in this inſtance it is not requiſite that any time be fixed for giving the victuals, becauſe articles of weight, and meaſurement of capacity, when deſcribed, become a debt, and a debt is ſometimes prompt and ſometimes deferred, like price, which conſiſts of money.—It is, however, a condition, with *Haneefa*, that an explanation be given of the *place* where the victuals are to be delivered, in caſe of any expence (of *porterage*, and ſo forth) attending it.—The two diſciples, on the contrary, maintain that this is not a condition, as has been fully ſtated under the head of SALE.—It is otherwiſe with reſpect to *apparel*; for in that inſtance an explanation is requiſite, not only of the *place*, but alſo of the *time* of delivery, as well as of the quantity; becauſe clothing is not conſtrued to be a debt except in a caſe of *Sillim* ſale; and as, in that inſtance, a prompt payment is requiſite, ſo alſo where the nurſe is hired for a recompence in clothes, it is requiſite that a prompt delivery be ſpecified, as well as the quantity and the quality.

The hirer, in the caſe above ſtated, is not at liberty to prevent the huſband of the nurſe from having carnal connexion with her; becauſe as ſuch connexion is the huſband's right, it is not in the hirer's power to annul it,—for this reaſon, that the huſband, in caſe of his not being informed of the contract at the time of concluding it, is entitled to diſſolve it, for the purpoſe of preſerving his own right.—The hirer, however, may prevent the huſband from having ſuch carnal intercourſe in *his* houſe, ſince that place is his excluſive right.—If, alſo, in conſequence of ſuch connexion, the nurſe prove pregnant, the infant's guardians are at liberty to diſſolve the contract, provided there be any apprehenſion of injury to the child's health from the uſe of her milk, as is moſt probable in ſuch inſtances;—and for the ſame reaſon alſo, they are at liberty to diſſolve the contract where the nurſe falls ſick.—It is alſo incumbent upon the nurſe to prepare the child's victuals by maſtication, and to avoid every ſpecies of food which might prove injurious to her milk, in purſuance of her duty.—In ſhort, in all matters of this nature, regard is had to cuſtom, where there is no divine ordinance. The performance, therefore, of every uſual ſervice to a child (ſuch as waſhing its linen, preparing its victuals, and ſo forth), is incumbent upon the nurſe. The *victuals*, however, muſt be provided by the father. With reſpect to what has been obſerved by *Mohammed*, that, "it is incumbent upon the nurſe to "provide *oils* and *perfumes*,"—this is according to the cuſtom of *Koofá*.

IF the nurſe above mentioned feed the child with goat's milk, during the term of hire, ſhe is not entitled to any wages, as not having performed what was her duty, namely foſterage, or, in other words, the feeding the child with milk from her own breaſts; for feeding it with milk from a goat is not foſterage, but merely *feeding it with milk*. Wages, therefore, are not due to her in this inſtance, as ſhe has not performed what ſhe had contracted for.

A contract of hire, ſtipulating that the recompence ſhall be paid from the article manufactured or wrought upon is invalid.

IF a perſon deliver thread to a weaver, to make it into cloth, in conſideration of an half thereof to himſelf, he is to receive a recompence proportionate to his work; and the ſame rule alſo holds if a perſon hire an aſs to carry wheat, paying, in conſideration, a meaſure of ſuch wheat. The contract, therefore, is invalid in both theſe inſtances, becauſe the recompence is made to conſiſt of a thing obtained by the labour of the perſon or animal hired, and hence the caſe is analogous to that of an allowance made for grinding *, which has been prohibited by the prophet. (The caſe of *allowance for grinding* is where a perſon hires an ox to grind grain in conſideration of a proportion from the flour or meal:—and this caſe is the grand criterion by which a judgment is formed of the invalidity in various inſtances of hire, more eſpecially in our country.) The reaſon

---

* Expreſſed by an *Arabic* phraſe (*Kafeez Tehàn*), which will not bear a literal tranſlation. It is more fully explained in Vol. IV. in treating of *Compacts of Cultivation*.

ſon of the prohibition, in this inſtance, is that the hirer is incapable of delivering the recompence, (namely, a part of the woven cloth, or a part of the carried grain); for as the obtaining of it depends upon the act of the perſon or animal hired, the hirer cannot be accounted capable of making delivery merely in virtue of the capacity of that perſon or animal. The contract is therefore invalid, and an adequate hire is due. It is otherwiſe where a perſon hires an aſs to carry *one* half of a parcel of wheat, in conſideration of the *other* half; for in this inſtance no hire is due on account of the animal hired, as the hirer has conſtituted the owner of the aſs proprietor of half of the grain upon the inſtant, in the manner of a prompt or advanced payment, and conſequently the wheat is in partnerſhip between them, for reaſons which will be explained in a future example. It is to be obſerved that where a perſon hires an aſs, to carry wheat, in conſideration of a meaſure of ſuch wheat, or an ox, to grind grain, the hire allowed muſt not exceed the value of what has been ſpecified, becauſe, as the hire is invalid, the *leaſt* only of the two (the hire named, or an adequate hire) is due, ſince the perſon who lets the animal has agreed to remit any thing beyond. It is otherwiſe where two men enter into a partnerſhip in collecting wood, and one of them ſays to the other, "I will take the whole wood, and pay you a recompence for your ſhare in the collecting of it;" for in this caſe an adequate recompence is due, to whatever amount, (according to *Mohammed*,) inaſmuch as no ſum has been ſpecified in this inſtance, whence no remiſſion of any exceſs can be inferred.

Partners do not owe hire to each other with reſpect to their ſtock.

If a perſon hire another to carry wheat which is in partnerſhip between them, no recompence is due; for in all grain ſo carried the porter works on his own account, whence a complete delivery is not made of the thing contracted for.

Any uncertainty in the terms invali-

If a perſon hire another to bake ten particular *ſaas* of wheat into bread, "this day," for a *dirm*, it is invalid, according to *Haneefa*.

The two diſciples, in the *Mabſoot*, article *Hire*, maintain that the contract in queſtion is valid; becauſe in this inſtance the performance of the *taſk* [of baking the bread] is the thing really contracted for, the mention of a time being conſidered merely as for the purpoſe of expedition, in order that the contract may be valid; and conſequently the objection of uncertainty is removed. The argument of *Haneefa* is that the thing contracted for is uncertain; becauſe the ſpecification of a time argues that the thing contracted for is general uſufruct, or, in other words, the hireling's ſurrender of himſelf [to ſervice]; and, on the other hand, the ſpecification of a particular act argues that ſuch act is the thing contracted for. Now general uſufruct and a particular act cannot be united; for where a particular act is the thing contracted for, no hire is due for the labourer's ſurrender of himſelf. As, moreover, neither of theſe has a preference over the other, and the advantage is to the *hirer*, in the latter inſtance, and to the *hireling* in the former, it follows that a contract of this nature would lay a foundation for ſtrife. It is reported, from *Haneefa*, that where the hirer, inſtead of "this day" ſays "*within* "*this day*," the hire is valid, as in ſuch caſe the thing contracted for is the particular act or taſk ſpecified: contrary to where he ſays "this day." The arguments upon this point are connected with Arabic grammar, and have already been ſtated in treating of *Divorce* *.

dates the contract.

IF a perſon hire land, ſtipulating that he ſhall be at liberty to *plough* and cultivate it, or to *water* and cultivate it, ſuch contract is valid;

A leaſe of lands is not invalidated

---

* The arguments in this example turn upon the diſtinction between the performance of a thing by *general* ſervice, and the performance of the ſame thing in a particular inſtance; that is, between hiring a perſon for any buſineſs by the *day*, or ſo forth, and engaging him for the performance of the ſame buſineſs by the *particular taſk*. If the contract for a *particular taſk* be ſo expreſſed as to leave it uncertain whether the recompence ſpecified be for the day's ſervice, or for the particular work required, it is in that caſe invalid, (according to *Haneefa*,) and conſequently no regard is had to the ſum mentioned as the recompence, but the workman receives a proportionate hire for his day's work.

Digitized by Google

by ſtipulating a right to perform any act which does not leave laſting effects.

valid; becauſe he is entitled to cultivate the land in virtue of the contract; and as this is impracticable unleſs he plough and water it, he is conſequently entitled to perform theſe acts upon it likewiſe; and every other act of this nature is in the ſame manner a requiſite of the contract; nor does the mention of it cauſe invalidity. If, on the contrary, he ſtipulate that he ſhall be at liberty to plough the land *twice*, or to dig trenches in it, or to dung it, the contract is invalid; becauſe, in this inſtance, an effect remains after the expiration of the term of hire, which is not a requiſite of the contract. This condition, moreover, is advantageous to one of the contracting parties; and every ſtipulation of that nature invalidates a contract. Beſides, in this inſtance, the leſſor becomes, in fact, a tenant of the leſſee with reſpect to ſuch advantage as may remain to the land after the expiration of the leaſe; and conſequently the contract involves one bargain within another, which is not lawful. Some explain ploughing *twice* to ſignify ploughing the land a ſecond time, after having reaped a crop from it, and then returning it in that ſtate to the owner; and concerning the invalidity in this inſtance no doubt can be entertained. Others, again, explain it to mean ploughing the land twice, and then ſowing the grain in it. What is here advanced (with reſpect to the invalidity occaſioned by ſtipulating a right of ploughing twice) applies ſolely to caſes where the land is of a nature to be productive from *once* ploughing, and the term of hire only one year;—for if the term of hire be *three* years (for inſtance,) the advantage derived from ploughing twice wears out and no longer remains. By the term *trenches*, as here uſed, *ſmall temporary* trenches are not to be underſtood, but *water courſes*, ſuch as are calculated to laſt, and yield an advantage the year enſuing.

A contract ſtipulating the recompence to conſiſt of a ſimilar uſufruct is nugatory.

If a perſon hire land to cultivate, in return for the right [on the part of the *leſſor*] of cultivating other land, it is nugatory; in other words, it is utterly invalid. *Shafeï* maintains that it is valid. Analogous to this is the hire of a dwelling-houſe, in return for reſidence in another houſe; the hire of apparel in return for the uſe of other apparel;—or the hire of a quadruped for riding, in return for a right of riding upon another quadruped. The argument of *Shafeï*, is that the advantage is the ſame as actual ſubſtance; and it is on this idea that hire is valid in return for a debt of wages*; for if thoſe were not the ſame as actual ſubſtance, it would follow that the tranſaction is the exchange of one debt for another debt, which is null. The arguments of our doctors upon this point are twofold.—FIRST, contracts upon credit are rendered invalid by an unity of ſpecies alone; and as an unity of weight or meaſure is not eſſential, (according to our doctors, as has been already explained in treating of ſale,) the contract in queſtion, therefore, reſembles the ſale, upon credit, of cloth of a particular deſcription in return for cloth of the ſame deſcription.—SECONDLY, the validity of hire is admitted (in oppoſition to what *analogy* would ſuggeſt) from convenience and neceſſity; but no convenience or neceſſity whatever exiſts where the advantage is exactly the ſame on both ſides: contrary to where the advantage derived on each part is different.

OBJECTION.—Where hire of one kind is in return for hire of another kind, although it be not rendered invalid by a non-exiſtence of neceſſity or convenience, ſtill it would follow that it is invalid, as being the ſale of a debt for a debt.

REPLY. In this inſtance the ſubject from which the advantage accrues is made a ſubſtitute for the advantage, from neceſſity:—the recompence, therefore, is as a *price*; and accordingly, the tranſaction is a ſale of ſubſtance for ſomething elſe than ſubſtance; which is lawful.

Caſe of two partners.

IF a quantity of wheat be between two men in partnerſhip, and one of them hire the other, or his aſs, to carry *his* ſhare to a certain place, and he, or his aſs, carry the *whole* of the wheat thither, he is not entitled either to the recompence ſpecified, or to a proportionate recompence. *Shafeï* maintains that he is entitled to the ſpecified recompence; becauſe, according to his tenets, advantage is the ſame as actual ſubſtance; and as the ſale of an undefined ſubſtance is lawful, it follows that it is alſo lawful to receive a recompence in return for an undefined advantage. The caſe in queſtion, therefore, is ſimilar to where a perſon hires a building, held in partnerſhip between himſelf and another, for the purpoſe of keeping grain,—or, a ſlave, held in partnerſhip between him and another, for the purpoſe of making up apparel. The arguments of our doctors upon this point are twofold.—FIRST, the perſon in queſtion here hires another for the performance of a matter the exiſtence of which cannot be conceived; becauſe the *carriage* or *porterage* of any thing is a ſenſible or perceptible act, which is impoſſible with reſpect to a thing undefined;—and as the performance of the thing contracted for is impoſſible, it follows that no recompence is due.—SECONDLY, The perſon hired is a partner of the hirer with reſpect to every particle he carries, whence he carries on his *own* account alſo, and conſequently does not perform what he had contracted for. It is otherwiſe where the thing contracted for is a partnerſhip houſe, for keeping grain, for in this inſtance the thing contracted for is the *uſe* of the houſe, and a delivery of that may be effected, without the perſon depoſiting his grain therein, by the other evacuating it to him.

---

* That is, wages owing from the perſon hired to the hirer; (as where the hirer had previouſly preformed ſervice to the perſon whom he now hires, and for which this perſon ſtill owes him wages.)

A leaſe of land is invalid, unleſs it ſpecify the purpoſe to which the land is to be applied.

IF a perſon hire land, without mentioning that it is for the purpoſe of cultivation, or, without mentioning what ſpecies of cultivation he means to employ it in, the contract is invalid; becauſe land is hired for tillage, and alſo for other purpoſes; and, in the ſame manner, it is cultivated for various uſes, ſome more and ſome leſs injurious to the ſoil. The thing contracted for is therefore uncertain; and accordingly, the contract is not lawful. Notwithſtanding this, however, if the perſon who hires the land ſhould cultivate it,

Digitized by Google

it, and the term of the leaſe expire, he is entitled to the ſpecified rent, on a favourable conſtruction. According to analogy he is not ſo entitled, (and ſuch is the opinion of *Ziffer*,) becauſe the contract, as being once invalid, cannot afterwards become valid.—The reaſon for a more favourable conſtruction, in this particular, is that, before the complete fulfilment of the contract, the uncertainty has been done away; and it therefore becomes valid, in the ſame manner as where the uncertainty is done away before the contract has been yet concluded;—the caſe being analogous to where a ſeller and purchaſer do away an undefined time of promiſe for payment or delivery, in ſale, before the uſual term of credit expires, or do away a right of option extended beyond the term of three days, before the expiration of thoſe three days.—If, in this caſe, the leſſor and leſſee diſpute before cultivation, the leſſee being deſirous of cultivating the land, and the leſſor forbidding him, the contract becomes diſſolved, in order that ſtrife may be prevented.

Reſponſibility does not attach, from the *cuſtomary* uſe of an article, under an indefinite contract.

IF a perſon hire an aſs to *Bagdad* (for inſtance) for one *dirm*, without ſpecifying what it is to carry, and load upon it ſuch a burden as men uſually put upon that animal, and it die before it has proceeded more than half way, he is not reſponſible; becauſe the article hired is as a *truſt* in the hands of the hirer, although the contract be invalid. If, on the other hand, the aſs arrive at *Bagdad*, the owner is entitled to the hire ſtipulated, upon a favourable conſtruction; becauſe in this inſtance the uncertainty has been done away, in the ſame manner as in the preceding example.—If, alſo, a diſpute ariſe between the hirer and the owner of the aſs, before it be loaded, the contract is diſſolved, in order that ſtrife may be prevented.

CHAP.

CHAP. V.

Of the Reſponſibility of a Hireling.

Difference between *common* and *particular* hirelings.

HIRELINGS are of two deſcriptions, *common* and *particular*.—A common * hireling is one with whom a contract of hire is concluded for work of ſuch a nature as may be perceived by examining the ſubject:—and in this inſtance there is no occaſion for any mention of a *term*; nor is he entitled to his hire or recompence until the work he has engaged for (ſuch as *dying* or *fulling*) be executed, becauſe the *work* is the only thing contracted for, where he engages to perform it in perſon, or the *effect* of ſuch work, where he has not particularly engaged to perform it in perſon.—It is therefore lawful for him to work for the public at large, ſince no particular perſon has any excluſive claim to his ſervice; and accordingly, he is termed *Ajeer Mooſhtarik*, that is, a *general* or *common* hireling.—(The rules with reſpect to particular hirelings ſhall be diſcuſſed in their proper place.)

The article committed to a *common* hireling is a depoſit:

AN article delivered to a common hireling is a *depoſit* in his hands. If, therefore, it periſh whilſt in his poſſeſſion, he is not in any degree reſponſible for it, according to *Haneefa*; and ſuch alſo is the opinion of *Ziffer*.—The two diſciples maintain that he is reſponſible, except where the article is loſt or deſtroyed by any irremediable and irreſiſtable accident, ſuch as a fire burning down his houſe, or robbers, in ſuch force as not to be repelled; becauſe it is recorded of *Alee* and

---

* Arab. *Mooſhtarik*, literally, *held in common*,—meaning one whoſe ſervices are open to all, (ſuch as a *tradeſman*,) in oppoſition to a particular *ſervant*.

Omar that they underſtood a common hireling to be reſponſible; and alſo, becauſe the care of the article is incumbent on him, as without ſuch care he cannot perform his work upon it. When, therefore, the article is loſt from any cauſe which might have been avoided ſuch as uſurpation or theft, this proves him to have been negligent, and he is conſequently reſponſible, in the ſame manner as a truſtee who lets to hire the depoſit in his hands.—It is otherwiſe where the article is loſt from ſome unavoidable cauſe, ſuch as fire, ſudden death, and ſo forth, ſince in this caſe he cannot be accuſed of negligence.—The argument of *Haneefa* is that the article is merely a *depoſit* in the workman's hands, the poſſeſſion of which does not involve reſponſibility, inaſmuch as he took poſſeſſion with conſent of the proprietor; and accordingly, if it were loſt from any unavoidable cauſe, he is not reſponſible,—whereas, if his poſſeſſion of it involved reſponſibility, he would owe a compenſation for it at all events, in the ſame manner as in a caſe of *uſurped* property.—The care, moreover, of the article is incumbent upon the proprietor *dependantly* and not *eſſentially*, and accordingly no hire is due for ſuch care. This caſe is different from that of an *hired* truſtee; for the care of the depoſit is *eſſentially* incumbent upon a truſtee who acts for hire, becauſe of the wages he receives.

but he is reſponſible if it be deſtroyed in the courſe of his work.

A COMMON hireling is reſponſible in caſe of the loſs or deſtruction of any article in the courſe of his work, as where a dyer or fuller tears the cloth entruſted to him, or a porter ſtumbles, or the tying of his load breaks, or the girth of a camel breaks, and thus the goods with which he is loaded fall to the ground, or a boat ſinks from the miſmanagement of the boatmen.—*Ziffer* maintains that the hireling is not reſponſible in thoſe caſes, becauſe the hirer had ordered him to work in an abſolute manner, and hence his order extends as well to dangerous as to ſafe operations,—in other words, to operations which ſubject his property to damage, and alſo to operations under which it continues uninjured. The hireling in queſtion, therefore, is in the ſame predicament with a *particular* hireling, or any aſſiſtant of a workman *. The argument of our doctors is that the orders of the hirer do not extend to any operations but what are mentioned in the contract; and thoſe are to be ſuppoſed of a ſafe nature, ſince in virtue of them is obtained the thing contracted for, namely, the effect of them,—whence it is that if this effect be obtained through the work of any other than the hireling, ſtill the recompence is due. The orders of the hirer, therefore, do not comprehend any operations that may be injurious, ſince through ſuch the thing contracted for, namely the effect, cannot be produced. It is otherwiſe with reſpect to the aſſiſtant of a workman; becauſe, as he works gratuitouſly, his work cannot be reſtricted to the condition of ſafety, for if it were ſo reſtricted, he would decline working gratuitouſly. It is alſo otherwiſe with reſpect to a *particular* hireling, as ſhall be hereafter explained.—(It is to be obſerved that the breaking of a camel's girth, or ſo forth, is ſuppoſed to originate with the hireling, inaſmuch as the accident may be attributed to his want of care.)—A common hireling, therefore, is reſponſible for any thing which may be deſtroyed in the courſe of his work; excepting, however, where a MAN is deſtroyed, either by the ſinking of a boat, or by falling from a camel or other animal, (although thoſe accidents ſhould have been occaſioned by the driving of the camel or the navigating of the boat;) for in this inſtance the hireling is not reſponſible, as reſponſibility for a MAN cannot be incurred in virtue of a contract, nor in virtue of any thing but a *Janâyat*, or offence againſt the perſon, whence it would be due, in this inſtance, not from the *hireling*, but from his *Akila*, who, however, cannot be made reſponſible by a *contract.*

If a perſon hire a porter to bring an earthen jar from the banks of the *Euphrates*, (for inſtance,) and he fall down upon the way and break the jar, the hirer has it at his option either to take the value which the jar bore at the place where it was taken up, (in which caſe the porter is not entitled to any recompence,) or to take a compenſation for the value it bore at the place where it was broken, paying the porter a proportionate hire.—Reſponſibility is incurred in this inſtance, becauſe (as was before ſaid) the falling of the jar was either owing to the porter ſtumbling, or his rope breaking, which is attributed to him:—and an option is allowed to the hirer; becauſe, where the jar is broken upon the road, the circumſtance admits of two conſtructions; for the hireling is in one ſhape guilty of a tranſgreſſion from the beginning, inaſmuch as the carriage of the jar from the place where it was taken up to the place directed is one act; and in another ſhape he is not guilty from the beginning, ſince the carriage was undertaken with the conſent of the owner, and conſequently no tranſgreſſion took place until the breaking of the jar;—the owner, therefore, has it at his option to proceed upon either ground;—if he proceed upon the *ſecond* ground, the hireling is to receive a recompence in proportion to the work he has rendered to the hirer; but if, upon the *firſt* ground, he is not to receive any thing, ſince in this view he has not rendered the hirer any ſervice whatever.

---

* Meaning a perſon who aſſiſts the workman *gratuitouſly*; (as will be perceived by the context a little further on.)

A ſurgeon, or farrier, acting agreeably to cuſtomary practice, is not reſponſible in caſe of accidents.

IF a ſurgeon perform the operation of phlebotomy in any cuſtomary part, he is not reſponſible in caſe of the perſon dying in conſequence of ſuch operation.—This is according to the *Mabſoot*.—It is written, in the *Jama Sagheer*, that if a farrier bleed an animal for a *dánik*, and the animal die in conſequence, or if a cupper perform the operation of cupping upon a ſlave by direction of his maſter, and the ſlave die in conſequence, no reſponſibility is incurred.—It is to be obſerved that the doctrine of the *Mabſoot*, in this particular, proceeds upon the idea of a reſtriction to the performance of the operation in ſome cuſtomary part; but it is unreſtricted with reſpect to the aſſent of the party or otherwiſe; whereas the doctrine in the *Jama Sagheer* proceeds upon the idea of a reſtriction with reſpect to the aſſent [of the owner of the ſlave or animal,] but is unreſtricted with reſpect to the part on which the operation is performed. Each of theſe reports, therefore, affords an argument with reſpect to the other; and conſequently the caſes in both are reſtricted to this, that the operation be performed in the uſual part, and with conſent of the party.—The ground on which the LAW proceeds in this particular is, that it is impoſſible for the operator to guard againſt conſequences, as thoſe muſt depend upon the ſtrength or weakneſs of the conſtitution in bearing any diſorder or pain; and as this is unknown, it is therefore impoſſible to reſtrict the work to the condition of ſafety.—It is otherwiſe with reſpect to tearing cloth, as before treated of, becauſe the ſtrength or weakneſs of cloth may be known by ſkill and attention, whence it is poſſible in that inſtance to reſtrict the work to ſafety. Thus much with reſpect to *common* or *general* hirelings.

A particular hireling

A PARTICULAR hireling ſignifies one who is entitled to his hire in virtue of a ſurrender of himſelf during the term of hire, although he do no work; as, for inſtance, a perſon who is hired as a *ſervant* for a month, or to *take care of flocks* for a month, at a certain rate, under a condition that he ſhall not ſerve or tend the flocks of any other perſon during that term.—An hireling of this deſcription is denominated an *Ajeer Wahid*, or *ſingular* hireling, becauſe the advantage of his ſervice belongs excluſively to a ſingle perſon during the term of his engagement, and the wages he receives are oppoſed to ſuch advantage:—and as the hireling, in this inſtance, is entitled to his hire in virtue of his ſurrender of himſelf, for the term of hire, he is entitled to his wages although he do no work, or although his work be afterwards undone; as where, for inſtance, a perſon is hired to make up a dreſs, and he ſew it accordingly, and the ſewing be afterwards ripped out, in which caſe he is nevertheleſs entitled to his hire.

is not reſponſible for any thing he loſes or deſtroys.

IF an article be loſt whilſt in the hands of a particular hireling, without his act, by a thief ſtealing it, (for inſtance,) or an uſurper carrying it away,—or, if it be loſt by his act, he is not reſponſible for it.—He is not reſponſible in the former inſtance, becauſe the article is a *depoſit* in his hands, ſince he took poſſeſſion of it with the owner's conſent.—(This, according to *Haneefa*, is evident:—and it is alſo evident according to the two diſciples, becauſe they hold that the obligation of reſponſibility upon a *common* hireling proceeds upon a favourable conſtruction of the LAW, in order that men's property may be in ſecurity; but as a *particular* hireling does not engage to work for *every* perſon, it is ſtill more likely that property is ſafe with ſuch an hireling; and therefore, in this caſe, the law proceeds upon analogy.)—He is alſo not reſponſible in the *ſecond* inſtance, becauſe, as the advantage of this hireling's ſervice is the property of the hirer, it follows that, where he directs him to act with his property, ſuch direction is valid: conſequently the hireling is his deputy; his acts, therefore, are the ſame as the acts of his principal, the hirer, and of courſe he is not reſponſible.

CHAP. VI.

Of Hire on one of two Conditions.

The hire is valid, of a *tradeſman*, under an alternative with reſpect to *work*;

If the owner of cloth ſay to the taylor whom he has engaged, "If "you make up this cloth in the *Perſian* faſhion, you ſhall have one "*dirm*, and if in the *Turkiſh* faſhion, you ſhall have two,"—it is valid, and the taylor is entitled to a recompence according to whichever of the two faſhions he makes up the cloth in. In the ſame manner, alſo, if he ſay to a dyer, "If you dye this cloth purple, you ſhall

" have one *dirm*, and if yellow, you ſhall have two," the dyer is entitled to a recompence, according as he dyes the cloth purple or yellow.—The ſame rule alſo holds if the proprietor of the article hired leave two things at the option of him who hires it;—as if he were to ſay to him " I let to you this houſe, for one month, for five *dirms*, " or this other houſe, for one month, for two *dirms*:"—and ſo likewiſe, if he leave at his option two different diſtances; as if he were to ſay " I hire to you this camel, to *Koofa*, for five *dirms*; or this, to " the half-way ſtation, for ſo much:"—and the ſame, alſo, if the proprietor give an option of *three* things: but if he give an option of *four* things, it is invalid.—In all theſe caſes regard is had to ſale; in other words, they are judged of by ſale; for if a perſon agree to ſell cloth, under this condition, that the purchaſer ſhall take either of two particular pieces, as he pleaſes, it is valid; (and ſo likewiſe, if he allow the purchaſer an option of one out of *three* pieces;) but it is not valid if he allow him an option of one out of *four* pieces.—The reaſon of this is that as cloth is of three deſcriptions, a good ſort, a bad ſort, and a medium ſort, an option of three is of uſe, and neceſſity is thereby anſwered; but as, in a caſe of four pieces, neceſſity is anſwered by a choice from a ſmaller number, ſo an option out of four is uſeleſs.—In the ſame manner, alſo, in hire, neceſſity is anſwered by an option from three things, as thoſe comprehend a good, a bad, and a middling ſort; and there is no occaſion for four, as neceſſity is anſwered by fewer.—There is, however, this difference between ſale and hire, that ſale is not valid unleſs an option of determination be ſtipulated; for if a perſon ſell one of two ſlaves, it is valid only in virtue of ſtipulating an option of determination.—A contract of hire, on the contrary, is valid, for one of two advantages, without ſtipulating an option of determination, becauſe the recompence is not due in virtue of the contract, but in virtue of the uſufruct or work; and conſequently, when the party commences the enjoyment of one of the advantages, the thing contracted for becomes known: but as, in a caſe of ſale, the price of the article is due in virtue of the contract, uncertainty

or of an article under an alternative of *another* article,

or with reſpect to the *uſe*.

tainty conſequently exiſts in that inſtance to ſuch a degree as leaves room for ſtrife, unleſs the purchaſer poſſeſs an option of determination.

Caſe of a tradeſman hired under an alternative with reſpect to *time*.

IF a perſon ſay to a taylor whom he hires, " If you make up this " garment this day, you ſhall have one *dirm*; and if to-morrow, you " ſhall have half a *dirm*," in this caſe, provided the taylor finiſh the garment within the day, he gets a *dirm*, or if he finiſh it the next day, he receives a proportionate hire (according to *Haneefa*) where that does not exceed half a *dirm*; in other words, he gets the leaſt of the two, between a half *dirm* and his proportionate hire.—It is written, in the *Jama Sagheer*, that he is entitled to his proportionate hire, not being leſs than half a *dirm*, nor more than one *dirm*.—The two diſciples allege that both conditions are valid, and conſequently, that if he perform his work on the morrow he gets an half *dirm*.—*Ziffer* maintains that both the conditions in queſtion are invalid; becauſe ſewing, or taylor's work, is one thing to which the hirer, in this inſtance, oppoſes two returns, (namely, one *dirm*, and half a *dirm*,) in the manner of a conſideration: the recompence, therefore, is uncertain.—The reaſon of this is that the mention of *this day* is merely for the purpoſe of haſtening, and the mention of *to-morrow* for the purpoſe of giving eaſe; and there is no ſuſpenſion; for if the hirer were to expreſs the contract " make up this garment by to-morrow, " for half a *dirm*," the contract is eſtabliſhed, inſomuch that if he make up the garment within the preſent day, he is entitled to half a *dirm*. Hence it appears that the mention of *to-morrow* is merely for the ſake of eaſe, and is not a ſuſpenſion; and conſequently two ſpecifications are united in one day.—The arguments of the two diſciples upon this point are twofold. FIRST, the mention of *this day* is for the purpoſe of determining a time, and the mention of *to-morrow* is by way of a condition: conſequently two ſpecifications are not united in one day. SECONDLY, quickneſs and delay are the deſigns: and the caſe therefore reſembles that of two ſpecies of work, ſuch as *Perſian* and *Turkiſh*.

The argument of *Haneefa* is that the mention of *to-morrow* is certainly by way of a condition.—The mentioning *this day*, moreover, cannot be conſtrued to imply *fixing a time*, for otherwiſe the contract of hire would be invalid, becauſe of its uniting time and work. Such, therefore, being the caſe, it follows that two ſpecifications are united in the mention of *to-morrow*, not in the mention of *this day*: conſequently the contract with reſpect to *this day* is valid, whence the hire mentioned is due, [in caſe of the work being finiſhed within the day;] but it is invalid with reſpect to *to-morrow*, whence [in caſe of the work being finiſhed on the morrow] a proportionate hire is due,—not exceeding, however, half a *dirm*, as that is what was ſpecified for *to-morrow*.—With reſpect to the quotation from the *Jama Sagheer* upon this ſubject, that "he is entitled to his proportionate hire, not being "leſs than half a *dirm*, nor more than one *dirm*," the ground on which it proceeds is, that the firſt ſpecification does not become extinct on the ſecond day, becauſe then both ſpecifications unite: regard, therefore, is had to it, with reſpect to preventing any exceſs beyond it; and to the ſecond ſpecification, with reſpect to preventing any deficiency.—If, in the caſe in queſtion, the taylor finiſh the garment on the *third* day, he gets whatever is leaſt of the two, his proportionate hire, or half a *dirm*. This is approved; becauſe, as the hirer was unwilling to have the work delayed for one day, it follows that he was ſtill more unwilling to have it delayed *longer* than one day.

Caſe of hire of a *ſhop*, under an alternative with reſpect to the buſineſs to be carried on in it;

If the leſſor of a ſhop ſay to a perſon about to hire it, "If you "place a perfumer in this ſhop the rent is one *dirm*, or if a blackſmith, it is two," the contract is valid, and the leſſor is entitled to one or other of the rents ſpecified, according to which of the two trades may be exerciſed in the ſhop. This is the doctrine of *Haneefa*. The two diſciples maintain that a contract thus expreſſed is invalid.—In the ſame manner, alſo, if a perſon hire a houſe, under this condition, that "if he reſide in it himſelf, the rent ſhall be one *dirm*, "or if he place a blackſmith in it, the rent ſhall be two *dirms*," it is *valid*,

valid, according to *Haneefa*, whereas the two diſciples deem it invalid.—If a perſon hire an animal to *Heera* for one *dirm*, under a condition that if he proceed on to *Kadſeea* he ſhall pay two *dirms*, it is valid: and in this inſtance, alſo, the above difference of opinion may be inferred; that is to ſay, this example is ſtated in the book [of *Kadoree*] generally, without mentioning any difference of opinion; but it bears the conſtruction of a difference of opinion, and alſo of an agreement of opinion.—If a perſon hire an animal to *Heera*, under this condition, that "if he load it with a *Koor* of barley he ſhall pay one "*dirm*, or if with a *Koor* of wheat he ſhall pay two *dirms*," it is valid according to *Haneefa*. The two diſciples maintain it to be invalid.—The ground on which the two diſciples proceed is, that in all the inſtances here recited the thing contracted for is uncertain; and in the ſame manner, the hire, as being one of two things, is alſo uncertain; and uncertainty occaſions invalidity.—It is otherwiſe in the example of making up apparel after the *Perſian* or the *Turkiſh* faſhion, becauſe the hire is due on account of the work, and in this inſtance the uncertainty is removed as ſoon as the work is begun; whereas in the examples in queſtion the hire is due on account of the relinquiſhment and delivery of the houſe or animal, whence the uncertainty ſtill continues, becauſe after delivery, in caſe of no uſe being made of the article, it is not known which of the two hires ſpecified is due, (for it is a principle, with the two diſciples, that hire is due on account of relinquiſhment and delivery.)—The argument of *Haneefa* is that the leſſor, in the caſe in queſtion, gives the leſſee an option of either of two valid contracts, of different deſcripions; for the hirer himſelf reſiding in the houſe is different from his placing a blackſmith to reſide in it; and ſuch being the caſe, the contract is valid, in the ſame manner as in the example of making up apparel after the *Perſian* or the *Turkiſh* faſhion.—With reſpect to what is advanced by the two diſciples, that "the hire is due on account of relinquiſhment and de"livery, whence the uncertainty ſtill continues," it may be replied that the deſign of the contract of hire is advantage or uſufruct; becauſe, as

and of an *animal*, under a condition with reſpect to the journey it is to perform,

or the load it is to carry.

as ſuch contracts are legalized to anſwer the neceſſity of mankind, it is evident that they are never entered into but with a view to ſuch advantage; and the uncertainty is removed upon the advantage commencing.—As, moreover, the relinquiſhment and delivery, without any enjoyment of the uſe, (which alone conſtitutes endowment,) are not principles, but rather mere accidents, there is no neceſſity to guard againſt uncertainty at the period of delivery.—Beſides, if it be required, in a contract of hire, that the hire be due on the inſtant of delivery, it follows that the *ſmalleſt* of the two hires ſpecified is due, as that is undoubted:—the hire, therefore, is not uncertain.

CHAP. VII.

Of the Hire of *Slaves*[*].

An hired ſervant cannot be taken upon a journey, unleſs it be ſo ſtipulated in the contract.

If a perſon hire a ſlave, as a ſervant, he is not at liberty to carry ſuch ſlave along with him upon a journey, unleſs this be a condition of the contract; becauſe, as travelling is attended with additional trouble, a contract in general terms is not held to extend to it; whence it is that travelling is a ſufficient plea for breaking off a contract of hire.—It is therefore requiſite that, in the contract in queſtion, travelling be particularly ſtipulated, in the ſame manner as the reſidence of a blackſmith or fuller in a dwelling-houſe.—Beſides, the difference between ſtationary ſervice and travelling ſervice is evident; and conſequently, upon ſtationary ſervice being aſcertained or ſpecified, the other deſcription (namely, travelling ſervice) cannot be included;—in the ſame manner as riding upon an animal; as for inſtance, where a perſon in general terms hires an animal to ride, and the rider is afterwards aſcertained, the hirer is not at liberty to ſet any other perſon upon the animal; and ſo likewiſe in the preſent caſe.

---

[*] It is a common practice, in *Arabia*, *Perſia*, &c. for ſlaves to hire themſelves in the capacity of menial ſervants, being accountable to their maſter for the wages they receive.

Wages paid to an inhibited ſlave, hired without the conſent of his owner, cannot be reſumed.

IF a perſon hire an inhibited [abſolute] ſlave for the term of one month, and pay him his wages after the performance of ſervice, he is not at liberty to reſume ſuch wages. The ground of this is that the hire in queſtion is valid, on a favourable conſtruction, where a ſlave is not otherwiſe occupied. Analogy would ſuggeſt that it is invalid, as the proprietor of the ſlave has not given his conſent, and the ſlave is a *Mahjoor*, or inhibited;—in the ſame manner as if the ſlave were to die before the completion of the ſervice; in which caſe the hirer would be reſponſible for his value; but he would not be reſponſible for any wages on account of the ſervice performed, ſince in employing the ſlave he becomes an uſurper,—whence he is, in caſe of the ſlave's death, required to pay a compenſation for his value; and as, upon ſo doing, he becomes proprietor of the ſlave from the firſt inſtant of employing him, he thus appears to have derived an advantage from his *own* ſlave; wherefore, in ſuch caſe, no wages are due.—The reaſon for a more favourable conſtruction, in this inſtance, is that the tranſaction in queſtion may be conſidered in two ſhapes; for firſt, it may be regarded as advantageous, on the idea of the ſlave being unoccupied by any other buſineſs, and remaining in ſafety; and ſecondly, it may be regarded as injurious, on the idea of the ſlave dying before he finiſhes his ſervice.—Now, on the idea of the tranſaction being advantageous, the ſlave is licenced therein, in a manner analogous to the acceptance of a gift. The contract of hire therefore is valid; and ſuch being the caſe, it follows that the hirer is not at liberty to take back the wages.

The uſurper of a ſlave is not reſponſible for what the ſlave earns during the term of uſurpation.

If a perſon uſurp a ſlave, and the ſlave afterwards let himſelf to hire, and the uſurper receive his wages, and expend the ſame, he is not reſponſible for them, according to *Haneefa*.—The two diſciples allege that he is reſponſible for the wages, becauſe he has acted with the property of the maſter without his conſent; (for the contract of hire is valid, on the grounds ſtated in the preceding example.) The argument of *Haneefa* is that reſponſibility does not attach except in the caſe of deſtruction of *protected* property *, (for the fixing of a price upon property is for the purpoſe of protecting it.) Now the wages in queſtion are not in a ſtate of protection or cuſtody in regard to the maſter, although they be ſo with reſpect to another, becauſe the protection or cuſtody of property is eſtabliſhed only by actual poſſeſſion, ſuch as may admit of the care of it, like the poſſeſſion of the proprietor, or his deputy; and the ſeizin of the ſlave is not the ſeizin of his maſter, ſince the ſlave himſelf is in the poſſeſſion of an uſurper, and being thus incapacitated from protecting his own perſon, is therefore incapable of protecting his wages from the uſurper.—If, however, the maſter find the wages in the uſurper's poſſeſſion, he is entitled to take them from him, as he in this caſe diſcovers his own property.—In the caſe in queſtion, alſo, it is lawful for the ſlave to take poſſeſſion of his wages from the uſurper, according to the opinion of our three doctors, ſince, if not otherwiſe employed, and remaining ſafe, he is licenced with reſpect to the tranſaction, becauſe of its being advantageous, as was before mentioned.—It is different where a maſter lets his ſlave to hire; for in this caſe the ſlave is not at liberty to take poſſeſſion of his wages unleſs his maſter conſtitute him his agent for that purpoſe, becauſe receiving the wages is one of the rights of the contract.

Caſe of a ſlave hired

If a perſon hire a ſlave for two months, with this diſtinction, that he

---

* Arab. *Mâl Mohirrez.*—The meaning of this has been fully explained elſewhere. (See *Hirz*, and *Mohirrez.*)

Digitized by Google

for different terms.

he ſhall ſerve one month for four *dirms*, and one month for five *dirms*, it is lawful; and the hire is for four *dirms* in the firſt month; becauſe the month firſt mentioned muſt be conſtrued to mean the month immediately ſucceeding the execution of the contract, in order to its validity; for otherwiſe the contract would be invalid, ſince in this caſe a month would appear included in it which is not ſpecified, and this would be invalid.—Beſides, the act of hiring infers that the hirer has immediate occaſion for the ſervice of the ſlave, whence the month in queſtion muſt neceſſarily be conſtrued to mean the month immediately ſucceeding the execution of the contract, in order that the hirer's neceſſity may be anſwered; and ſuch being the caſe, the ſecond month muſt in the ſame manner be neceſſarily conſtrued to mean the month immediately ſucceeding the firſt month.

Caſe of a hired ſlave abſconding before the expiration of the term.

If a perſon hire a ſlave for one month, at the rate of one *dirm*, and take poſſeſſion of the ſlave in the beginning of the month, and at the end of the month, the ſlave having abſconded or fallen ſick, the hirer and the owner or maſter diſpute,—the hirer aſſerting that the ſlave had abſconded or fallen ſick in the beginning of the month, and the maſter, that he had not fallen ſick or abſconded until within a ſhort time,—the aſſertion of the hirer muſt be credited.—If, on the other hand, the hirer produce the ſlave, he being then preſent and in good health, the aſſertion of the maſter muſt be credited; becauſe, as the parties differ upon a point which is of a problematical nature, a preference muſt be given to the ſide of the queſtion which is beſt ſupported by apparent circumſtances. The principle upon which the LAW in this inſtance proceeds is to be found in the caſe of the running or ſtopping of a mill ſtream; for if the hirer of a mill diſpute with the proprietor concerning the running of the ſtream during the term of hire*, in this caſe the aſſertion of that party is credited on whoſe behalf apparent circumſtances bear teſtimony *.—If, on the contrary, they diſpute concerning the deficiency in the running of the ſtream,—as if the leſſee were to ſay that it had not run for *ten* days, and the leſſor that it had not run for *five* days, in this caſe the aſſertion of the tenant muſt be credited, or evidence on the part of the leſſor.

---

* He aſſerting that the ſtream had not run at all, and conſequently that the mill ſtood ſtill during the whole term.

CHAP. VIII.

Of Diſputes between the Hirer and the Hireling.

In caſes of diſpute with a tradeſman concerning the orders he has received, the aſſertion of the *employer* muſt be credited;

If a diſpute ariſe between the taylor and the owner of cloth,—the owner aſſerting that "he had directed the taylor to make the cloth "into a *veſt*," and the taylor that "the owner had directed him to "make it into *drawers*,"—or if a ſimilar diſpute happen with a *dyer*, the owner of the cloth affirming that he had directed him [the dyer] "to colour the cloth yellow," and the dyer that "he [the owner] "had directed him to dye it red,"—in either caſe the declaration of the owner of the cloth muſt be credited, ſince it is from him that the orders proceed.—The ground of this is, that as, if the owner of the cloth were to deny the original order †, by diſavowing the contract of hire, his word would be credited,—ſo, in the ſame manner, his word muſt be credited where he denies the deſcription or qualification of the order.—He muſt, however, be ſworn, becauſe he in this inſtance denies a thing which, if he were to *acknowledge* it, would be binding upon him. Upon the owner of the cloth ſwearing, the taylor becomes reſponſible; that is, the owner of the cloth has it at his option either to take the value of the cloth,—or to take the drawers, paying the taylor an adequate hire.—In the ſame manner, alſo, in the caſe of dying, upon the owner of the cloth ſwearing, he has it at his option either to take a recompence for the value of the cloth uncoloured, or to take the dyed cloth, paying the dyer an adequate hire not beyond the value,—becauſe the dyer, in acting contrary to his inſtructions, ſtands in the ſame predicament with an uſurper.

---

* That is to ſay, if, at the time of the aſſertion, the ſtream be running, the *proprietor* muſt be credited; but if otherwiſe, the *tenant*.

† That is, *were to deny his ever having given any order* (with reſpect to dying or making up the cloth.)

and ſo alſo, if the diſpute be with regard to *wages.*

If a diſpute ariſe between the owner of cloth and the dyer, taylor, or other workman,—the owner aſſerting that "he [the workman] "had agreed to execute the work without hire," and the workman that "he wrought for hire," the aſſertion of the owner muſt be credited, inaſmuch as he both denies any price having been put upon the workman's labour, (which can only be effected by a contract,) and alſo any reſponſibility, or, in other words, any hire being due, which the owner claims; and the aſſertion of the defendant [upon oath] muſt be credited. *Aboo Yooſaf* maintains that if the workman be one commonly employed by the owner of the cloth, and with whom it has been uſual for the owner to fix an hire for his work, he is entitled to a hire proportionate to what he performs; but that, if he was not commonly employed by the owner, he gets nothing whatever; and the reaſon is, that it is only former practice which can furniſh a ground of requiſition of wages, and eſtabliſh the rate at which they are to be fixed in the preſent inſtance. *Mohammed* ſays that if it have been a general and known practice of the workman to work for hire, his word muſt be credited, becauſe whenever he opens a workſhop for the purpoſe of carrying on his buſineſs, this ſtands in place of an expreſs declaration that he works for hire, as apparent circumſtances ſignify thus much. It is to be obſerved that the opinion of *Haneefa,* as here ſtated, proceeds upon analogy, the owner of the cloth ſtanding as the *denier*, or *defendant*. The opinion of the two diſciples, on the other hand, proceeds upon a favourable conſtruction.—In reply to what they advance in this particular it may be obſerved that apparent circumſtances may ſuffice to *repel*, but are not ſufficient to *eſtabliſh* a claim; in other words, if a perſon advance a claim, ſuch claim may be ſet aſide by apparent circumſtances, but apparent circumſtances are incapable of conſtituting proof, or of eſtabliſhing any thing in his behalf; and, in the preſent inſtance, it is required that a claim be eſtabliſhed. *Sheikh-al Iſlâm* remarks that decrees paſs according to the opinion of *Mohammed*,—as is alſo mentioned in the *Kafeea*.

CHAP. IX.

Of the Diſſolution* of Contracts of Hire.

A contract for the hire of a *houſe* is diſſolved by a defect in it.

If a perſon hire a houſe, and then diſcover a defect in it, ſuch as renders it uninhabitable, he is at liberty to diſſolve the contract; becauſe the contract was executed with a view to advantage; and as that continually, from time to time, is the object of the hirer, it follows that the defect diſcovered in the houſe had exiſtence previous to his obtaining poſſeſſion of the thing actually contracted for, although it had occurred ſubſequent to taking poſſeſſion of the houſe, in the ſame manner as where a defect has taken place in merchandize before the purchaſer obtains poſſeſſion of it. If, however, the hirer derive the advantage, [that is, make uſe of the houſe,] he aſſents to the defect; and in ſuch caſe the whole conſideration (namely, the rent) is incumbent upon him, in the ſame manner as in ſale.—If, alſo, the leſſor perform what is requiſite to remedy the defect, the hirer is in that caſe without an option, as the reaſon for ſuch option is then done away.

---

* Arab. *Fiſkh*; literally, a *breaking off*.

If a houſe fall to decay, or the wells for watering land dry up, or a mill ſtream ceaſe to run, the contract of hire is diſſolved, becauſe in ſuch caſe the thing contracted for (namely, excluſive advantage) is defeated before poſſeſſion, and the caſe is therefore the ſame as where merchandize periſhes before poſſeſſion, or where an hired ſlave dies.—Some of our modern doctors hold that the contract of hire is not diſſolved in this inſtance, becauſe the advantage has been defeated in a manner which admits a recovery of it. The caſe is therefore the ſame as where a ſlave dies after purchaſe, but before delivery; and as, in that caſe, the contract [of ſale] is not diſſolved, ſo likewiſe, in the preſent inſtance, the contract [of hire] is not diſſolved.—It is recorded, from *Mohammed*, that if, in the caſe in queſtion, the leſſor remove the defect, by repairing the houſe, the hirer muſt abide by the contract, and alſo the leſſor.—From this it is to be inferred that the contract is not diſſolved.—It is, however, diſſolved.

or by its falling to decay; and the hire of *land*, by its wells being dried up,—or of a *mill*, by the mill-ſtream ſtopping;

If a mill-ſtream ceaſe from running, and the mill-houſe be applicable to any other uſe than that of grinding grain, the hirer muſt pay a rent proportionably to the uſe derived from ſuch houſe, as that is a part of what was contracted for.

(but if the mill-houſe be uſed, a proportionate rent is due.)

If one of the contracting parties die, and the hirer had entered into the contract of hire on his own account, it [the contract of hire] is diſſolved; becauſe if the contract were ſtill to remain in force, it would follow that the uſufruct, or rent, then becomes the right of

A contract of hire is diſſolved by the death of one of the contracting parties, being a *principal*.

of a perſon who was not a party to the contract, namely, the heir, (ſince it would ſhift from the deceaſed to his heir,) which is unlawful. Beſides, with reſpect to the leſſor, it is the uſe of *his* property which forms the ſubject of the contract; and as, in conſequence of his deceaſe, this property changes to his heir, it follows that the contract of hire becomes null, becauſe of the ſubject being loſt; for a change in the right of property is the ſame as a change in the thing itſelf.—With reſpect to the hirer, or renter, on the contrary, if the contract were to remain in force after his deceaſe, it can only do ſo upon the principle that his heir is his ſubſtitute. But the uſe of a houſe cannot be a heritage without the houſe itſelf, becauſe inheritance is a ſucceſſion, which is impoſſible except with reſpect to a thing which endures at both times, ſo as to be at firſt the right of the perſon through whom inheritance deſcends, and at laſt to be ſucceeded to by his heir.—As, therefore, inheritance cannot hold with reſpect to the uſe, the contract of hire is neceſſarily annulled. It is otherwiſe where a perſon enters into a contract of hire on behalf of any other than himſelf, ſuch as an agent, an executor, or the procurator of a *Wakf*; for in that caſe the contract is not annulled, ſince if the contracting party die, the contract is then transferred to him in whoſe behalf it was executed, and he conſequently becomes, by conſtruction of LAW, the contractor.

It admits a reſerve of option.

A RESERVE of option is valid in hire. *Shafeï* maintains that it is invalid; becauſe if a right of option be reſerved to the hirer, it is impoſſible for him to reject, that is, to return the thing contracted for complete, ſince in ſuch caſe ſome part of that thing is loſt; or if, on the other hand, a right of option be reſerved to the leſſor, it is impoſſible for him to make a complete delivery; and either circumſtance is repugnant to the validity of option. The argument of our doctors is that a contract of hire is a contract of commerce, in which it is not required that poſſeſſion be taken at the meeting of the contract;

tract*; and a condition of option may therefore be lawfully inſerted in it, in the ſame manner as in a contract of ſale.—The cauſe, moreover, of the validity of option, in a contract of ſale, (namely convenience,) is alſo to be found in a contract of hire.—In anſwer to the arguments advanced by *Shafeï*, it may be obſerved that the circumſtance of a part of the ſubject of the contract being loſt is not repugnant to a rejection: in oppoſition to *ſale*, as in that inſtance the circumſtance of any part of the ſubject of the contract being loſt is repugnant to a rejection under conditional option, or option from defect.—The reaſon of this is that, in ſale, a complete return of the article is practicable, under conditional option, or option from defect, whereas in hire this is impracticable; a *complete* return of the ſubject of the contract is therefore required in the one caſe, but not in the other.—As, moreover, a complete delivery is impracticable in hire, the hirer may be compelled to take poſſeſſion, in caſe of the leſſor making delivery of it at a time when part of the term has elapſed:—in other words, where a perſon takes a houſe (for inſtance) for a year, and the leſſor does not deliver it until after the lapſe of a month, the leſſee is not at liberty to decline taking poſſeſſion of it for the reſt of the year.

It is diſſolved by the occurrence of any ſufficient *pretext* for diſſolution.

A CONTRACT of hire is diſſolved by a pretext†, according to our doctors.—*Shafeï* maintains that it is not diſſolved but by a defect or failure, becauſe as (agreeably to his tenets) the advantage ſtands in place of actual ſubſtance, (whence it is that a contract holds with reſpect to it,) the caſe therefore bears a reſemblance to ſale.—The argument of our doctors is that advantage is the thing contracted for; and as that is not a ſubject of ſeizin, a pretext in hire reſembles a failure or defect in merchandize exiſting before it be taken poſſeſſion of,—in which caſe the contract of ſale is annulled, as the ſeller cannot carry it into execution without bearing or occaſioning an injury, not incurred by it; and the ſame reaſon holds in hire alſo, as this is the meaning of an *Oozir*, or pretext, according to our doctors.

---

* Meaning, at the time and place where the contract is executed.

† Meaning (in this place) any circumſtance which would render it impoſſible to carry the contract into execution without inducing, to one or other of the parties, an injury not provided for or mentioned in the contract.—It is more fully explained a little farther on.

Circumſtances which form a pretext for diſſolving contracts of hire.

If a perſon, being afflicted with the toothach, hire a ſurgeon to draw one of his teeth, and the pain afterwards ceaſe,—or hire a cook to prepare a marriage-feaſt, and afterwards repudiate the bride by her own deſire *, the contract of hire is diſſolved, becauſe if it were to continue in force, the hirer would ſuffer a ſuperinduced injury not incurred by the contract:—and the ſame rule alſo holds, if a perſon hire a ſhop for traffic, and his property be all afterwards diſpoſed of.

If a perſon let to hire a houſe or ſhop, and afterwards become poor and involved in debt to a degree which he is unable to diſcharge but by the price of the houſe or ſhop, the *Kâzee* muſt in this caſe diſſolve the contract of hire, and ſell the place for payment of the debt; becauſe in the endurance of the contract the leſſor ſuſtains a ſuperinduced injury not incurred by the contract,—which ſuperinduced injury, in this inſtance, is that the *Kâzee* will otherwiſe ſeize and impriſon him on account of the debts, as he cannot be certain whether the debtor ſpeaks truly in declaring that "this is his only property." From the expreſſion "the *Kâzee* muſt in this caſe diſſolve the "contract," it may be inferred that a decree of the *Kâzee* is requiſite to the diſſolution; and the ſame is mentioned in the *Zeeadât*, treating of a pretext of debt. *Mohammed*, on the other hand, in the *Jama Sagheer*, ſays "Whatever I have deſcribed to be a pretext, is competent "to the annulling of hire;"—whence it may be inferred that there is no occaſion for a decree of the *Kâzee*; becauſe, as a pretext, in hire, is the ſame as a defect in merchandize before ſeizin, (as was before mentioned,) it follows that the contracting party may of himſelf diſſolve the contract.—The ground of the opinion in the *Zeeadât* is that as, concerning the diſſolution of hire on account of a pretext, there is a difference of opinion, it is therefore requiſite that the *Kâzee* iſſue a decree and render it obligatory. Some of the *Haneefite* doctors endeavour to reconcile both opinions, by explaining that if the pretext be not of an evident nature, (ſuch as *debt*,) there is no occaſion for a decree of the *Kâzee*; but if it be not evident, a decree of the *Kâzee* is requiſite to render it ſo.

---

* See *Khoola*.—This ſpecies of divorce moſt commonly happens in conſequence of an averſion conceived by a wife to her huſband at their firſt meeting.

IF a perſon hire an animal to carry him upon a journey, and ſomething afterwards occur to prevent his proceeding, this is a pretext; for if the contract were put in force, he might be ſubjected to injury, —as a perſon may go upon a pilgrimage, and the proper ſeaſon for it may in the mean while paſs away,—or he may go in ſearch of a perſon who is indebted to him, and that perſon in the mean time may appear,—or he may proceed upon a trading excurſion, and may in the mean time become poor.—If, on the contrary, the obſtacle to the journey occur to the *Makàr*, or perſon who lets the animal to hire[*], it is not admitted as a pretext, becauſe it is in his power, if he do not chuſe to go himſelf, to ſend the animal under the care of one of his ſervants or apprentices.—If, alſo, the *Makàr* fall ſick, ſo as to be incapable of proceeding upon the journey, this is not a pretext, according to the *Mabſoot*.—*Koorokhee* is of opinion that it is a pretext, ſince ſending his animal under the care of another perſon is not altogether void of injury:—the contract, therefore, is ſet aſide in a caſe of unavoidable neceſſity, as in ſickneſs, but not in a caſe of mere option, as in health.

---

[*] *Makàr* is a perſon whoſe buſineſs it is to let horſes, camels, &c. to hire.

If a perſon let his ſlave to hire, and afterwards ſell him, this is not a pretext, becauſe he ſuſtains no injury in caſe of the contract being put into force, the only conſequence incurred being, that his right of advantage (from the ſlave's hire) is loſt, which is out of the queſtion in the preſent inſtance.

If a taylor hire a ſervant to ſew for him, and he afterwards become bankrupt, and quit his buſineſs of taylor, this is a pretext; for if the contract were to continue in force he would ſuſtain injury, becauſe of his means (namely, his capital) being loſt.—It is proper to remark, that by the taylor mentioned in this example is to be underſtood one who carries on buſineſs on his own account: for with reſpect to a taylor who works for hire, his only capital is a needle, thread, and ſciſſors, whence he cannot be conſidered as becoming bankrupt. If a taylor, who has hired an aſſiſtant as above, be deſirous to quit his buſineſs of taylor and to purſue the buſineſs of a money-changer, this is not a pretext, as it is in his power to place the hireling in a particular part of his ſhop for the purpoſe of exerciſing the buſineſs of a taylor, whilſt he himſelf purſues the buſineſs of a money-changer in another part.—It is otherwiſe where a perſon hires a ſhop to carry on the buſineſs of a taylor, and is afterwards deſirous to exerciſe ſome other trade, for this is not a pretext; the reaſon of which (as mentioned in the *Mabſoot*) is that one perſon cannot exerciſe two different profeſſions.—In the inſtance, however, of a taylor hiring a ſervant to ſew, the perſons are *two*, and conſequently may exerciſe two different trades.

If a perſon hire a ſervant to attend him in a city, and afterwards travel, this is a pretext, as not being altogether void of injury; for the trouble of attendance is greater in travelling; whence if the ſervant were to go upon the journey, he would ſuſtain an injury; or if, on the other hand, the hirer were prevented from undertaking the journey, he on his part would be injured; and as neither is to incur an injury by the contract, it follows that the circumſtance in queſtion forms a pretext.—The ſame rule alſo holds if the ſervant be hired in an *abſolute* manner, by the hirer ſaying to him (or to his *maſter*, ſuppoſing the hireling to be a ſlave) "I hire you" (or "I hire your "ſlave") to wait upon me," without reſtricting the ſervice either to a ſtationary or a travelling deſcription, becauſe it has been already mentioned that the hire is in ſuch caſe reſtricted to *ſtationary* ſervice.

IF a perſon let land, and be afterwards deſirous to make a journey, this is not a pretext, becauſe it does not induce any injury, ſince the leſſee or hirer has it ſtill in his power to derive his advantage from the land, after the leſſor's departure.—If, on the contrary, the leſſee be deſirous to make a journey, this is a pretext, ſince a continuance of the leaſe muſt either prevent the journey, or induce an obligation of rent without reſidence, which would be injurious.

SECTION.

MISCELLANEOUS CASES.

A hirer or borrower of land is not reſponſible for accidents in burning off the ſtubble, &c.

IF a perſon either hire or borrow land, and in burning the *Hiſſayed*, or ſtubble and roots of the ſoil, happen to burn any thing upon the neighbouring lands, he is not reſponſible; becauſe as, in exciting the cauſe of the deſtruction, he was not guilty of any tranſgreſſion or treſpaſs, he therefore ſtands in the ſame predicament with a perſon who digs a well in his own houſe *.—Some ſay that this holds only where he ſets fire to the ſtubble during a calm, the wind riſing afterwards;—for if he ſet fire to it whilſt the wind is blowing, he is reſponſible, as he muſt in ſuch caſe be ſenſible that the fire will extend beyond his land.

---

* A perſon digging a well on the public highway, or in any other place of general acceſs, is reſponſible for the fine in caſe of any perſon being killed by falling into it; but a perſon digging a well in his own houſe or land is not reſponſible.

A tradeſman may unite with another, for a moiety of the hire acquired upon the work.

If a fuller, taylor, or dyer, who keeps a public ſhop, and is poſſeſſed of credit, but unſkilled in his trade, place any perſon in his ſhop who is ſkilled in the buſineſs, with a view that he ſhall himſelf procure cloth to be wrought upon, and the perſon in queſtion work with it, under a condition that a moiety of the recompence or hire ſhall go to him, this is lawful and valid, as being a *Shirkat Wadjooh*, or partnerſhip upon credit; becauſe, as the ſhop-keeper procures the cloth to be wrought with upon his own credit, and the perſon in queſtion works upon it, the ends of both parties are thus completely anſwered;—neither is the uncertainty with reſpect to the amount of the time injurious, ſince that muſt be in proportion to what is acquired.

Hire of a camel to carry a *litter* with two perſons.

If a man hire a camel to carry a litter with two perſons to *Mecca*, it is valid, on a favourable conſtruction,—and he is at liberty to put upon the camel a litter of the uſual dimenſions.—Analogy would ſuggeſt that a contract of this nature is invalid, (and ſuch is the doctrine of *Shafeï*,) becauſe the quality of a litter, with reſpect to its length, breadth, and weight, is uncertain, and may poſſibly occaſion diſputes. The reaſon for a more favourable conſtruction of the LAW, in this inſtance, is that the intent of the rider is merely the conveyance of his perſon upon the animal, the litter being a ſubordinate conſideration. Beſides, as any uncertainty is removed by ſuppoſing the litter to be ſuch as is commonly uſed, there can be no occaſion for contention.—The ſame rule holds, although the owner of the camel ſhould not have ſeen the carpet and other appurtenances.—It is, however, preferable that he view the litter, &c. as thus uncertainty is removed, and his aſſent indubitably eſtabliſhed.

Digitized by Google

If a perſon hire a camel to carry proviſions upon a journey, he is entitled to load the camel with other articles during the journey, in proportion as the proviſions are conſumed, becauſe, as being entitled to the carriage of a ſpecific load for the whole journey, he is therefore entitled to exact ſuch carriage complete.—The ſame rule alſo holds with reſpect to any thing elſe beſides proviſions, provided it be an article of weight, or meaſurement of capacity.

A ſumpter-camel may be loaded with other articles in proportion as the proviſions he carries are conſumed.

Objection.—It is not cuſtomary for travellers to impoſe any additional load upon an animal in lieu of the proviſions they conſume upon the way;—and as abſolute contracts muſt be conſtrued agreeably to cuſtom, it would follow that it is not lawful to load the animal with other articles in lieu of the conſumed proviſions.

Reply.—Cuſtom admits of either conſtruction, ſince in ſome inſtances it is uſual to ſupply the defect in the article conſumed, as in the caſe of *water*, for inſtance;—and where cuſtom is various, it is preferable, in abſolute contracts, to act agreeably to the requiſites of them.

HEDÂYA.

Digitized by Google

H E D Â Y A.

BOOK XXXII.

Of MOKATIBS.

Definition of the terms.

KITABAT, in its literal ſenſe, ſignifies a ſlave purchaſing his own perſon from his maſter, in return for a ſum to be paid out of his earnings,—according to the expoſition in the *Jama Ramooz*.—(From what occurs in the courſe of the preſent work it appears that the literal meaning of *Kitàbat* is *junction*, or *union*.)—In the language of the LAW it ſignifies the emancipation of a ſlave,—with reſpect to the rights of poſſeſſion and action (in other words, the conveyance and appropriation of property) at the time of the contract, and with reſpect to his perſon at the time of his paying the conſideration of *Kitàbat* *.

Chap. I. Introductory.
Chap. II. Of invalid *Kitàbat*.
Chap. III. Of Acts lawful to a *Mokâtib*, or otherwiſe.
Chap. IV. Of a Perſon tranſacting a *Kitàbat* on behalf of a Slave.
Chap. V. Of the *Kitàbat* of Partnerſhip Slaves.
Chap. VI. Of the Death or Inſolvency of the *Mokâtib*; and of the Death of his Maſter.

CHAP. I.

A contract of *Kitàbat* is valid, with the ſlave's aſſent.

If a perſon offer to conſtitute his male or female ſlave a *Mokâtib*, in return for a certain property, and the ſlave aſſent, it is valid, and the ſlave becomes a *Mokâtib*.—This tranſaction is valid, becauſe God has ſaid, in the Koran, [ſpeaking of ſlaves,] "GRANT THEM A COVENANT IF YE KNOW GOOD IN THEM;"—which precept, however, is not *injunƈtive*, but merely *recommendatory*, according to all our doctors.—(By the expreſſion in the text "IF YE KNOW GOOD IN "THEM" is to be underſtood, according to ſome, "if ye perceive "that the *Muſſulmans* will ſuſtain no injury from them after they "have attained freedom,"—for otherwiſe it is better that they be not conſtituted *Mokâtibs*, although it would in ſuch caſe be nevertheleſs valid.)—The aſſent of the ſlave, however, is a condition of it, becauſe as an obligation for property is thereby incurred, it is therefore requiſite that he accede to and undertake ſuch obligation.

---

* This, for the ſake of brevity, the traſlator has in general rendered *ranſom*.—The *Molovees* ſeem to be miſtaken in their definition of the *literal* ſenſe of *Kitàbat*, what they ſtate as ſuch being rather the *occaſional* than the *primitive* meaning of the term.—*Kitàbat*, in fact, ſimply means (agreeably to the ſenſe of it root) an *indenture* or *covenant*, whence a *Mokâtib* might with propriety be defined a *covenanted ſlave*.

A *Mokâtib* is free upon paying his complete ranſom,

A MOKÂTIB is not free until he pay his complete ranſom, becauſe the prophet has ſaid "*If a ſlave be made a* MOKÂTIB *for one hundred* "DEENARS, *and pay the ſame, except ten* DEENARS, *he is ſtill a* "SLAVE;" and he has alſo elſewhere ſaid, "*A* MOKÂTIB *is a ſlave* "*as long as a ſingle* DIRM *ſhall remain againſt him.*"—It is to be obſerved, however, that the companions diſagreed upon this point; and that the doctrine adopted by our doctors (as here recited) is conformable to the opinion of *Zeyd*.

although this be not expreſsly ſtipulated in the contract.

A MOKÂTIB becomes free upon the payment of his ranſom, although his maſter ſhould not have expreſsly mentioned this in the contract; becauſe the contract requires that freedom be eſtabliſhed without being expreſsly mentioned;—in the ſame manner as in ſale; that is to ſay, as in ſale there is no neceſſity for the ſeller ſaying to the purchaſer, "*I conſtitute you proprietor of this merchandize*,"—ſo alſo in the preſent inſtance.—Neither is it incumbent [upon the maſter] to abate any thing from the ranſom, in the ſame manner as, in ſale, it is not incumbent [on the purchaſer] to abate any thing from the price.—Some have ſaid that it is incumbent that one fourth be abated from the ranſom.

The ranſom may be ſtipulated to be

IT is lawful to ſtipulate that the ranſom ſhall be paid down immediately: and it is alſo lawful that it be deferred,—or, that it be fixed

Digitized by Google

fixed to be paid in certain proportions at ſtated periods.—*Shafeï* maintains that it is not lawful to ſtipulate an *immediate* payment, but that it *muſt* be paid in at leaſt *two lots*, becauſe a *Mokâtib* has it not in his power to pay his ranſom at a ſhort warning, ſince he is incapable of poſſeſſing property previous to the contract, as being a ſlave. It is otherwiſe in a caſe of *Sillim* ſale. In other words, if a perſon enter into a contract of *Sillim*, with reſpect to an article oppoſed to ten *dirms*, it is lawful (according to *Shafeï*) although the perſon to whom the advance is made be incapable of producing upon the inſtant the article for which the advance is given, ſince as he is competent to poſſeſs himſelf of it, it follows that his ability to deliver it is eſtabliſhed,—eſpecially as his engaging in the contract argues ſuch ability.—The arguments of our doctors upon this point are threefold.—FIRST, the text of the KORAN, already quoted, evinces that the *Kitàbat* is valid, without any condition of payment in two lots.—SECONDLY, a contract of *Kitàbat* is a contract of exchange; and as the ranſom is the thing concerning which the contract is made, it therefore reſembles the price of an article of ſale, with reſpect to no condition being made concerning ability of payment.—It is otherwiſe in a *Sillim* ſale, (according to our doctors,) ſince as the article for which the advance is made is the ſubject of the contract in that inſtance, a delay in the delivery of it is indiſpenſable, in order that the perſon to whom the advance is made may be enabled to produce it.—THIRDLY, as a contract of *Kitàbat* turns entirely upon relief and indulgence, it is evident that the maſter will be eaſy with his ſlave in this particular.—It is otherwiſe in a *Sillim* ſale; becauſe that turns entirely upon tender and acceptance. Beſides, if the ranſom were ſtipulated to be immediately paid, and it ſhould happen that the ſlave was incapable of paying it, ſtill there is no cauſe of diſpute, ſince, if unable to pay it, he would continue a ſlave as before, and the contract of *Kitàbat* would be annulled.—It is otherwiſe in a *Sillim* ſale, for as that is not annulled by an incapacity to produce the article for which the advance has been paid, a contention is conſequently occaſioned.

either *prompt* or *deferred.*

A rational infant may be conſtituted a *Mokâtib*.

It is lawful to conſtitute *Mokâtib* an infant ſlave, provided he know the meaning of purchaſe and ſale; becauſe in that caſe tender and acceptance exiſt, as an infant endowed with reaſon is capable of aſſenting; and the tranſaction is advantageous to him.—*Shafeï* differs from our doctors in this inſtance.—This difference of doctrine is founded on the caſe of an infant's conſent in a tranſaction of commerce; for if the guardian of an infant give his ward permiſſion to engage in commerce, purchaſe and ſale made by him is valid, according to our doctors, provided the infant underſtand theſe tranſactions; whereas this is invalid according to *Shafeï*.—If, however, the infant in queſtion do not underſtand purchaſe and ſale, he cannot lawfully be conſtituted a *Mokâtib*, becauſe as no aſſent exiſts in ſuch caſe, the contract cannot be concluded; and hence if any other perſon were to pay the ranſom on behalf of ſuch infant, ſtill he is not emancipated, and the maſter muſt return what that perſon has ſo paid him.

Kitàbat is contracted by any addreſs to a ſlave which ſuſpends his freedom upon the payment of money.

If a perſon ſay to his ſlave, "I give you credit for one thouſand "*dirms*, which you are to pay to me at various times, ſo much at "one time, and ſo much at another; and when you have thus diſ"charged the whole, you are free,—but if you be unable to diſ"charge it, you remain a ſlave,"—ſuch declaration amounts to a contract of *Kitàbat*, ſince this is the explanation of contracts of *Kitàbat*. If, alſo, he ſay, "If you pay me one thouſand *dirms*, at the rate of "one hundred *dirms* per month, you are free," this likewiſe is a contract of *Kitàbat*, according to *Aboo Soliman*, becauſe a ſpecification of times (namely, of each month) argues an obligation for property, which obligation holds only in virtue of *Kitàbat*.—*Aboo Hifz* ſays that the declaration in queſtion is not a contract of *Kitàbat*, becauſe of its analogy to a ſuſpenſion of *Kitàbat* upon the payment of one thouſand *dirms* at once;—that is, if the maſter were to ſay, "Upon paying me "one thouſand *dirms*, you are free," it is not a contract of *Kitâbat*; and ſo here likewiſe.

Digitized by Google

The *Mokâtib* eſcapes from the *poſſeſſion* of his maſter, but not from his *property*;

UPON the contract of *Kitàbat* being concluded, the *Mokâtib* eſcapes from the poſſeſſion of his maſter *, but not from his right of property.—He eſcapes from his poſſeſſion, becauſe the intendment of a contract of *Kitàbat* is the payment of ranſom, which cannot be effected unleſs the *Mokâtib* be placed out of the poſſeſſion of his maſter. The *Mokàtib*, therefore, is empowered to purchaſe and ſell, and may travel although his maſter ſhould forbid him.—He does not, however, eſcape from his maſter's right of property, becauſe of the ſaying before quoted; and alſo, becauſe *Kitàbat* is a contract of exchange, which reſts upon a perfect equality between the parties; and if the *Mokâtib* were to become free upon the inſtant, equality could not be eſtabliſhed; but if his freedom be deferred, this equality is eſtabliſhed, becauſe as the ſlave is, on the one hand, enabled to poſſeſs himſelf of the property requiſite to diſcharge his ranſom, the maſter is thus, on the other hand, enabled to reſume poſſeſſion of him in the event of that not being paid, which he could not do if the ſlave were free upon the inſtant of the contract.—As, therefore, the *Mokàtib* does not eſcape from his maſter's right of property, it follows that, if the maſter ſhould in the interim emancipate him, he becomes free in virtue of manumiſſion, ſince he [the maſter] is ſtill proprietor of his perſon:—and in this caſe the ranſom is remitted, as the *Mokâtib* had agreed to the payment of that merely with a view of obtaining his freedom in return, but which he thus procures without it.

Whence the maſter may ſtill emancipate him gratis.

A maſter, having carnal connexion with his *Mokàtibá*, is liable to a fine.

IF a maſter have carnal intercourſe with his *Mokátibá*, (or female ſlave to whom he has granted *Kitàbat*,) he is liable to a fine of treſpaſs †; becauſe the ſlave, in virtue of the *Kitàbat*, obtains a right over every part of her own perſon, in order that the end of *Kitàbat* may be anſwered, which, with reſpect to the maſter, is to obtain the ranſom, and with reſpect to the *Mokâtibâ*, to become free in conſequence of the contract; and as the *uſe* of her perſon ſtands as an actual part of the perſon, it follows that ſhe has obtained a right with reſpect to that alſo.—If, alſo, the maſter commit any offence againſt the *Mokâtibâ*'s perſon, or againſt the perſons of her children, he is liable to pay an amercement, for the ſame reaſon.—In the ſame manner, if he deſtroy any of her property, he muſt make atonement; becauſe he is as a ſtranger with reſpect to her acquiſitions; for otherwiſe he might at any time deſtroy or conſume them, and conſequently the deſign of the contract would be defeated.

---

* Literally, "is out of his maſter's hands," which diſables the maſter from ſelling or otherwiſe diſpoſing of him, and from appropriating his earnings, although he ſtill continue his property.

† To be paid to the *Mokâtibá*.

CHAP. II.

Of invalid *Kitàbat*.

Kitàbat in conſideration of any unlawful article is invalid:

If a *Muſſulman* make his ſlave a *Mokâtib* in conſideration of wine, or a hog,—or in conſideration of his value, (by ſaying to him, "I make "you a *Mokâtib* in conſideration of your value,")—the *Kitàbat* is in ſuch caſes invalid.—It is invalid in the firſt inſtance, becauſe a *Muſſulman* can have no claim to wine or a hog, ſince with him thoſe articles are not property, and conſequently they cannot compoſe a ranſom.—It is alſo invalid in the ſecond inſtance, becauſe the value is uncertain with reſpect both to its amount and its quality, ſince it is unknown whether it be one hundred or two hundred coins, whether thoſe be gold or ſilver, or whether they be pure or baſe; and as this is a wide uncertainty, the contract is therefore invalid; in the ſame manner as if a perſon were to make his ſlave a *Mokâtib* in return for undefined cloth, or for an undefined houſe or animal, in which caſe the contract would be invalid, and ſo in the preſent inſtance likewiſe.

but the ſlave is free upon paying the article,

If a *Muſſulman* make his ſlave a *Mokâtib* in conſideration of wine, and the ſlave pay the ſame, he is free, according to the *Zâhir Rawâyet.*—*Ziffer* maintains that he is not free unleſs he pay the value of the wine, ſince it is that which conſtitutes the ranſom in this inſtance. *Aboo Yooſaf* ſays that the ſlave becomes free in conſequence of paying the wine, merely as it is that which conſtitutes the ranſom in appearance; but that he is alſo made free by paying the value, as it is that which conſtitutes the ranſom in reality.—*Haneefa* holds that he does not become free in conſequence of paying the wine, unleſs his maſter ſhould have ſaid to him, "If you pay ſuch wine, you are free," in which caſe manumiſſion is ſuſpended upon the condition ſtated, and conſequently the ſlave becomes free upon the performance of the condition;—in the ſame manner as in a caſe of *Kitàbat* in conſideration of carrion or blood; that is to ſay, if a perſon make his ſlave a *Mokâtib* in conſideration of carrion or blood, the contract is valid, provided the maſter ſhould have ſaid "upon paying it you are free;" and he is accordingly emancipated upon paying the blood or carrion; and ſo likewiſe in the caſe in queſtion.—It is to be obſerved that, in the *Zâhir Rawâyet*, no diſtinction is made between the caſe of the maſter ſaying "*If* you pay," (and ſo forth,) or otherwiſe.—The diſtinction between wine or pork, and carrion or blood, is that the former articles are, in effect, property, whence it is poſſible, in the caſe of thoſe articles, to have regard to the eſſence of the contract, which requires that the *Mokâtib* be free upon paying the article ſtipulated;—whereas blood and carrion are not in any ſhape property, whence it is impoſſible, in the caſe of ſuch articles, to have regard to the eſſence of the contract, and accordingly regard is there had to the eſſence of the condition,

provided this be expreſsly ſtipulated in the contract;

which exiſts where the maſter expreſsly declares, in the contract of *Kitàbat*, "*If* you pay it, you are free."

and muſt perform emancipatory labour to his full value,

Upon the *Mokàtib* becoming free in conſequence of paying the wine or pork, it is incumbent upon him to perform *Seeàyet*, or emancipatory labour, to his full value; for it is incumbent upon him to return his *perſon*, becauſe of the invalidity of the contract; but as this is impoſſible, becauſe of his manumiſſion, it is conſequently incumbent on him to pay the *value* of his perſon;—in the ſame manner as in a caſe of invalid ſale, where, if the article purchaſed be loſt or expended by the purchaſer, it is incumbent on him to pay the ſeller the value, as he cannot return the actual article.—The ſlave, therefore, muſt perform emancipatory labour for his value.—If, however, his value fall ſhort of the value of the article named, he is to perform labour to the amount or value of the article named, and not for his own value; but if, on the contrary, his value exceed the value of the article named, he muſt perform labour to the amount of his value; for as the contract is invalid, the value it involves is incumbent, to whatever amount, in the ſame manner as in an invalid ſale.—The ground of this is that the maſter is averſe to incurring any loſs, as he is averſe to granting manumiſſion, unleſs he can ſecure the amount which he names.—He, therefore, will not be content with any thing ſhort of what he names. The ſlave, on the other hand, is content to pay ſtill more, in order that his right (namely, emancipation) may not be annulled.—Hence his value is due, to whatever amount.

or to the value of the article named.

Objection.—As manumiſſion is eſtabliſhed by the payment of the wine, and cannot be annulled, it would appear that our author's expreſſion "in order that his right may not be annulled," is incorrect.

Reply.—As, according to the *Zàhir Rawàyet*, the *Mokàtib* is not emancipated upon paying the wine or pork, unleſs the maſter ſhould have ſaid "*if* you pay it, you are free," it is poſſible that the *Kàzee* or *Mooftee* may proceed, in their decree, upon ſome other authority, in which caſe the *Mokâtib*'s right (to freedom) would be annulled.—Hence the expreſſion "in order that his right may not be annulled," is perfectly correct.

Where the ranſom is ſtipulated to be the "*value*" of the ſlave, he is free upon paying the utmoſt extent of his eſtimated value.

Where a perſon makes his ſlave a *Mokâtib* "in conſideration of "his value," he is free upon paying ſuch value; for it is that which conſtitutes the ranſom in this inſtance; and it is poſſible to have a due attention to the ſpirit of the contract of *Kitàbat*, by the *Mokâtib* paying to his maſter property to the utmoſt extent of his value, which is effected by one perſon valuing him at thirty *dirms*, (for inſtance,) one at thirty-five, and one at forty, and none beyond that, and the *Mokâtib* paying forty *dirms*;—this, therefore, is a due payment of his value, which is his ranſom.

Objection.—As the value of the ſlave is uncertain, in the ſame manner as the value of undefined cloth, it would follow that this uncertainty ought to operate on the contract, and prevent its validity, ſo far as that the ſlave ſhould not be made free by paying his value, in the ſame manner as a ſlave is not made free by paying the value of the cloth, in a caſe where he has been made a *Mokâtib* in return for cloth without an explanation of its qualities.

Reply.—An uncertainty with reſpect to the value renders the contract *invalid*, but does not *annul* it.—It is otherwiſe where the ranſom is made to conſiſt of undefined cloth, as that renders the contract totally null, the deſign of the party being unknown, becauſe of the variety of kinds in cloth; for his deſign is not to procure *any* cloth, (ſince his right of property could not be abrogated in virtue of *any cloth whatever*,) but ſome *particular* cloth, and it is impoſſible to tell whether the cloth paid by the *Mokâtib* be that particular cloth, or not.—A payment, therefore, cannot be eſtabliſhed in this inſtance, and conſequently manumiſſion cannot be eſtabliſhed, ſo long as the deſign of the maſter is unknown.

Digitized by Google

Kitàbat in conſideration of another's ſpecific property is invalid,

If a maſter create his ſlave a *Mokâtib* in conſideration of a ſpecific article, the property of another, it is invalid, as he is incapable of delivering ſuch article.—The compiler of the *Hedâya* remarks, that by a *ſpecific article* is to be underſtood any thing capable of identification in a contract of exchange; for if the maſter were to ſay "I make "you a *Mokâtib* in conſideration of thoſe thouſand *dirms*," meaning *dirms* the property of another perſon, it is valid, ſince as thoſe are not identified in a contract of exchange, the contract of *Kitàbat* is therefore referred to a *debt* of *dirms*, and is conſequently valid.—*Haſan* reports, from *Haneefa*, that in the caſe in queſtion the contract is valid; whence if the *Mokâtib* become poſſeſſed of the article ſpecified, and deliver it to his maſter, he is free; or if incapable of delivering it, he again becomes an abſolute ſlave as before. The ground of this is, that as the article mentioned is property, and the ſlave's capacity to deliver it is conceivable, it therefore reſembles a dower; that is to ſay, if a perſon marry a woman, ſettling upon her the ſlave of another, the marriage is lawful, whence if he be able to deliver the ſlave, he will do ſo,—or, if not, he will pay the value;—and in the ſame manner, in the caſe in queſtion, the contract of *Kitàbat* is valid; with this difference, however, that if capable of delivering the article, he [the *Mokâtib*] will deliver it accordingly; but if not, he will revert to his original ſtate as a mere ſlave.—But to this it may be replied, that in a contract of exchange the identic article is the object of the contract, the ability to deliver which is eſſential to a contract of exchange, where it is of a nature that admits the idea of diſſolution, ſuch as *ſale*. It is otherwiſe with reſpect to the dower, in marriage, becauſe as, in marriage, the ability of procreation (which is the end of marriage) is not eſſential, it follows that ability to deliver a thing which is a mere dependant thereof, (ſuch as the dower,) is not eſſential, *a fortiori*.

unleſs that other ſignify his aſſent.

If a maſter create his ſlave a *Mokâtib* in conſideration of a ſpecific article, the property of another, and capable of identification, and the proprietor afterwards accede thereto, it is recorded, from *Mohammed*, that the contract is lawful; for, as ſale is rendered lawful by the aſſent of the proprietor of the article ſold, where that is ſold by a ſtranger, it follows that *Kitàbat*, under a ſimilar circumſtance, is lawful *a fortiori*, as ſale is conducted upon principles of ſtrictneſs, whereas *Kitàbat* is conducted upon liberal principles. It is recorded, from *Haneefa*, that a *Kitàbat* of the nature here deſcribed is invalid, (according to what is written in the *Mabſoot*,) becauſe, ſuppoſing the proprietor of the article not to accede, it is not lawful, for this reaſon, that the *Mokâtib* does not, in virtue of it, become proprietor of his own acquiſitions, which is the deſign, as a *Mokâtib* is conſtituted proprietor of what he can earn, from neceſſity, that he may acquire property, and therewith emancipate his perſon; and in a caſe where the ranſom is made to conſiſt of a certain ſpecific article, this neceſſity does not exiſt; conſequently the contract of *Kitàbat* here treated of is invalid;—and as the ſame reaſon alſo exiſts where the proprietor accedes, in that caſe alſo it is invalid. *Aboo Yooſaf* ſays that the contract is lawful in either caſe,—that is, both where the proprietor of the article accedes, and alſo where he does not accede,—with this difference, however, that where he accedes it is incumbent upon the *Mokâtib* to deliver to his maſter the actual article, and where he does not accede, to pay the value of it,—in the ſame manner as in marriage,—as the reaſon for the legality of the marriage, namely the validity of the ſpecification, becauſe of the thing ſpecified being property, exiſts in the preſent caſe alſo. It is recorded, from *Haneefa*, that if the *Mokâtib* obtain poſſeſſion, and make delivery of the article ſpecified, ſtill he is not free; but if his maſter had ſaid to him, "*If* you give me ſuch an article, you "are free," he is in this caſe free, in virtue of the *condition*, not in virtue of the contract of *Kitàbat*, for (according to this report) the contract of *Kitàbat* was never completely concluded. The ſame is alſo recorded from *Aboo Yooſaf*. It is likewiſe recorded, from him, that the ſlave is free upon delivering the article, although the maſter ſhould not have ſaid, "*If* you give me ſuch an article, you are free,"

becauſe

becauſe the contract of *Kitàbat* has been completely concluded, as the article named is property; it is, however, invalid; and conſequently the ſlave becomes free (not in virtue of the *contract*, but) in virtue of delivering the article ſtipulated.

Caſe of *Kitàbat* in conſideration of property poſſeſſed by a *Mazoon*.

If a maſter create his ſlave a *Mokâtib* in conſideration of a ſpecific article in his poſſeſſion, (that is, which has been earned by him in conſequence of his being privileged to trade,) there are two reports concerning it, as may be learned from the *Mabſoot*. The compiler of the *Hedâya* obſerves that he has formerly treated of this point at large in the *Kafâyat-al-moontihee*.

A *Kitàbat* ſtipulating the delivery of an unſpecified article to the *Mokâtib* is invalid.

If a maſter create his ſlave a *Mokâtib* in conſideration of one hundred *deenars*, under this condition, that "he ſhall give to the "*Mokâtib* a ſlave unſpecified," the contract is invalid, according to *Haneefa* and *Mohammed*. *Aboo Yooſaf* maintains that it is lawful; and that the hundred *deenars* are divided between the value of the *Mokâtib* and of a medium ſlave; and the proportion on the value of the medium ſlave being deducted from the hundred, the *Mokâtib* obtains his *Kitàbat* in conſideration of the remainder; becauſe, as any ſlave is capable of conſtituting a ranſom, and (when abſolutely mentioned) is calculated at the rate of a *medium* ſlave, it follows that he is in the ſame manner capable of being ſubſtracted from the ranſom, as is cuſtomary in contracts of exchange. The argument of *Haneefa* and *Mohammed* is that the *ſlave* cannot be ſubſtracted from *deenars*, but only his *value*; and as that is incapable of conſtituting ranſom, becauſe of its uncertainty, ſo in the ſame manner it is incapable of being ſubſtracted from the ranſom.

Kitàbat is valid in conſideration of an animal undeſcribed.

If a maſter create his ſlave a *Mokâtib* in conſideration of an animal undeſcribed, it is lawful. The compiler of the *Hedâya* remarks, that it is here underſtood that the maſter explains the *ſpecies* of the animal, but not his deſcriptive qualities;—as if he were to ſay, "I make

“ you a *Mokâtib* in conſideration of a *horſe*,” without mentioning whether he is to be an *Arab* or a *Toorkee*. The contract in queſtion is therefore valid; and the animal named is ſuppoſed to mean a *medium* animal of that ſpecies; and the maſter may be compelled to accept of the value;—as has been already fully explained in treating of the dower. Where, however, the ſpecies of the animal is not explained, (as if he were to ſay, “ I make you a *Mokâtib* in conſideration of *an* “ *animal*,”) it is unlawful; becauſe as animals are of various ſpecies, the uncertainty in this inſtance is very great, whereas if the ſpecies be mentioned it is trifling, and a trifling uncertainty may be admitted in a contract of *Kitàbat*, it being conſidered in the ſame light with an uncertainty concerning the *term* of a contract of *Kitàbat*;—that is to ſay, if a perſon create his ſlave a *Mokâtib* in conſideration of one thouſand *dirms*, to be paid at the reaping of the harveſt, or at the plucking of the dates, it is lawful; and ſo alſo in the caſe in queſtion.—*Shafeï* maintains that it is unlawful, (and ſuch is what analogy would ſuggeſt,) ſince, as *Kitàbat* is a contract of exchange, it is conſequently ſubject, in this particular, to the ſame rule as ſale.—The argument of our doctors is that a *Kitàbat* is, in the beginning, an exchange of property for what is not property, becauſe, *prima facie*, the conſideration (or ranſom) is oppoſed to the removal of reſtriction, which is not property;—and it is, in the end, an exchange of property for property, becauſe, in the end, the conſideration is oppoſed to the perſon of the *Mokâtib*,—in this way, however, that the maſter's right of property over his [the *Mokâtib*'s] perſon drops,—for the *Mokâtib* cannot become proprietor of his own perſon:—hence the contract is (as it were) in effect an exchange of property for what is not property, and conſequently reſembles marriage.—The reaſon of and analogy between *Kitàbat* and marriage is, that they both proceed upon liberal principles; in oppoſition to ſale, as that is conducted upon principles of ſtrictneſs.

Kitàbat by an infidel, in conſideration of an unlawful article, is valid; and if either party embrace the faith, the *value* of the article is due;

If a Chriſtian create his ſlave a *Mokâtib* in conſideration of wine, it is lawful, provided the quantity of the wine be ſpecified, and the ſlave be an infidel, becauſe wine, with reſpect to infidels, is the ſame as vinegar with reſpect to *Muſſulmans*.—The contract is therefore valid; and if afterwards either of the contracting parties embrace the faith, the maſter is entitled to the value of the wine, as *Muſſulmans* are prohibited from either making conveyance or taking poſſeſſion of that article.—The LAW, in this example, is different from that in the caſe of a *Zimmee* ſelling wine to another *Zimmee*; for if one of thoſe afterwards become a *Muſſulman*, the ſale (according to ſome) is invalid.—The reaſon of this is that the value of the *article* named is capable of conſtituting the ranſom, upon the inſtant of the contract,—(for if a perſon were to create his ſlave a *Mokátib* in conſideration of a *Waſeef*, or ſlave-boy, and the ſlave make a tender of the *value*, the maſter may be compelled to accept it,)—and ſuch being the caſe, it follows that it is alſo capable of conſtituting the ranſom in the *endurance* of the contract.—A valid ſale, on the contrary, cannot be concluded in conſideration of the *value* of the thing named.—Hence there is an evident difference between *Kitabat* and ſale.

but the ſlave is free *without* the *value*, if the maſter take poſſeſſion of the *article*.

If a Chriſtian create his infidel ſlave a *Mokátib* in conſideration of wine of which the quantity is known, and one of the contracting parties become a *Muſſulman*, and the maſter afterwards take poſſeſſion of the wine, the ſlave becomes free; for a contract of *Kitàbat* poſſeſſes the property of a contract of exchange; and conſequently, upon the maſter obtaining one of the two conſiderations, the ſlave is entitled to the other, which cannot be obtained without his freedom.

If the ſlave be a *Muſſulman* the contract is invalid.

If a Chriſtian create his *Muſſulman* ſlave a *Mokátib* in conſideration of wine, the *Kitàbat* is invalid, although the quantity of the wine be aſcertained, becauſe as a *Muſſulman* is incapable of undertaking any obligation

Digitized by Google

obligation for wine, the contract is conſequently unlawful.—Notwithſtanding this, however, if the ſlave deliver the wine he is free, for the reaſons explained in the beginning of this chapter.

CHAP. III.

Of Acts unlawful to a *Mokâtib*, or otherwiſe.

A *Mokâtib* may buy and ſell; and remove from place to place;

It is lawful for a *Mokâtib* to buy and ſell, and to remove from place to place; becauſe it is a requiſite of a contract of *Kitàbat* that the *Mokâtib* become free with reſpect to his actions, in ſuch a degree as may enable him independantly to perform whatever may be neceſſary towards the attainment of the deſign, namely, the obtainance of freedom in return for ranſom; and of this nature are purchaſe and ſale,—and ſo likewiſe journeying from place to place, ſince it may poſſibly happen that traffic is not to be found in one particular ſpot, and conſequently that there is a neceſſity for removing.

and execute a *Mohabât*.

It is lawful for a *Mokâtib* to execute a *Mohabât*[*], as that is a tranſaction of traffic, ſince merchants ſometimes buy or ſell in the manner of *Mohabât* in one bargain, in order that they may derive a profit upon ſome other bargain.

---

[*] *Mohabât* means buying an article at an *over*-value, or ſelling it at an *under*-value, which is ſometimes done with a view to induce the party to engage in ſome other tranſaction of a more advantageous nature. It is fully treated of elſewhere.

If

He may leave a place, although his maſter have ſtipulated otherwiſe.

If the maſter make it a condition with his *Mokâtib* that he ſhall not go forth from ſuch a particular place, (*Koofa*, for inſtance,) ſtill he is at liberty to go forth from thence, on a favourable conſtruction of the LAW,—becauſe a contract of *Kitàbat* requires that the *Mokâtib* be enabled independantly to poſſeſs himſelf of what he is to give as a ranſom, and that he have full power and title with reſpect to his own perſon, and the advantage to be obtained from his perſonal exertions. Now the condition in queſtion is repugnant thereto. It is conſequently null; but the contract is valid, becauſe the virtue of that cannot be effected by a condition of the nature here deſcribed.—Beſides, a contract of *Kitàbat* cannot be rendered invalid by the inſertion of ſuch a condition; becauſe *Kitàbat* reſembles ſale, and it alſo reſembles marriage: the contract in queſtion is therefore referred to ſale in all caſes where the inſertion of an invalid condition tends to invalidate the contract;—(as where, for inſtance, the maſter ſtipulates for an uncertain ſervice, by ſaying to his ſlave, "I create you a *Mokâtib* in "conſideration of your ſerving me *for a time*,"—which condition affects the virtue of the contract, as the ranſom is here made to conſiſt of ſervice for an indefinite term;)—and it is referred to marriage in all caſes where the inſertion of an invalid condition does *not* tend to invalidate the contract;—and it is cuſtomary, in practice, to proceed on either reſemblance.—Beſides, a contract of *Kitàbat* is a manumiſſion on the part of the ſlave, as being a deſtruction of the property in him; and as the condition in queſtion (that he ſhall not go forth from *Koofa*) is connected with the ſlave, the contract is accordingly a manumiſſion with reſpect to that condition; and manumiſſion is not annulled by the inſertion of an invalid condition.

He cannot *marry* without the conſent of his maſter.

It is not lawful for a *Mokâtib* to marry without the conſent of his maſter; becauſe a contract of *Kitàbat* operates to the removal of reſtriction, (under this qualification, that the *Mokâtib* ſtill continue the property of his maſter,) in order that it may be a means of accompliſhing the deſign; and *marriage* is not a means of accompliſhing the deſign, as it is not an acquiſition of property, but rather occaſions the *Mokâtib* to be employed in diſcharging his wife's dower, and providing her maintenance. His marriage is therefore unlawful without his maſter's conſent; but it is lawful if he conſent, ſince he is empowered in this particular.

He cannot beſtow gifts, or alms,

IT is not lawful for a *Mokâtib* to beſtow gifts or alms, except a trifle; becauſe gift and alms are gratuitous acts; and he is not poſſeſſed of any property in an *abſolute* manner, ſo as to be capable of conveying it.—The conveyance, however, of trifling matters is incidental to traffic; for it is neceſſary that he make entertainments and grant loans, in order to draw wealthy merchants about him; and a perſon who is empowered with reſpect to any thing, (ſuch as *trade*,) is alſo empowered with reſpect to its neceſſary incidents.

or become bail,

IT is not lawful for a *Mokâtib* to become bail; becauſe bail is an act peculiarly gratuitous, being neither neceſſarily incidental to commerce, nor to the acquiſition of property.—It is therefore unlawful for him to become bail, whether for the perſon or for property, as both ſpecies of bail are gratuitous.

or grant a *Karz* loan.

IT is not lawful for a *Mokâtib* to grant a *Karz* loan, becauſe that alſo is a gratuitous act not neceſſarily incidental to the acquiſition of property.—If, therefore, a *Mokâtib* make a gift of any thing, under condition of receiving ſomething in return, it is diſapproved, as this is *prima facie* a gratuitous act.

He may contract his *female* ſlave in marriage;

IF a *Mokâtib* contract his female ſlave in marriage, it is lawful, as being an acquiſition of property, becauſe in conſequence of ſo contracting her he obtains poſſeſſion of her dower.—The contract of *Kitabat*, therefore, comprehends this.

or create his [male or female] ſlave a *Mokatib*;

If a *Mokátib* create his ſlave a *Mokátib*, it is lawful, on a favourable conſtruction. Analogy would ſuggeſt that it is unlawful, (and ſuch is the opinion of *Ziffer* and *Shafeï*,) becauſe *Kitabat* leads to manumiſſion, with reſpect to which he is not empowered;—in the ſame manner as manumiſſion for a compenſation; that is to ſay, as, if a *Mokátib* were to ſay to his ſlave, "I emancipate you in conſideration "of one thouſand *dirms*," it is invalid, it would conſequently follow that his making his ſlave a *Mokátib* is alſo invalid. The reaſon for a more favourable conſtruction, in this particular, is that a contract of *Kitàbat* is a contract for the acquiſition of property, wherefore the *Mokâtib* is empowered with reſpect to the point in queſtion, in the ſame manner as with reſpect to contracting his female ſlave in marriage, or with reſpect to ſale.—Making his ſlave a *Mokâtib*, moreover, may on ſome occaſions be more advantageous than ſale, becauſe his right of property is not deſtroyed by the *Kitàbat* until he have obtained the conſideration for it,—whereas his right of property is deſtroyed by ſale before he has obtained the price for the article ſold,—whence it is that a father or executor are at liberty to enter into a contract of *Kitàbat* with the ſlave of their infant ward. As, therefore, a *Mokâtib* may lawfully create his ſlave a *Mokâtib*, it follows that, in conſequence of the contract of *Kitàbat*, his ſlave is endowed only with every right with which he is himſelf endowed. It is otherwiſe in manumiſſion for a compenſation; becauſe in virtue of that the ſlave is endowed with that with which the *Mokâtib* is not himſelf endowed; ſince in conſequence of manumiſſion for a compenſation the ſlave is free upon the inſtant,—whereas the *Mokâtib*, in conſequence of the contract of *Kitàbat*, only becomes eventually entitled to freedom, but is not free upon the inſtant.

(in which caſe the *Willa* of ſuch *Mokâtib* reſts with the firſt *Mokâtib*'s maſter.)

If the *Mokâtib* of a *Mokâtib* pay his ranſom before the *Mokâtib* ſhall have himſelf become free, the *Willa* appertains to the maſter of the *Mokâtib*, becauſe the property of him veſts in one ſhape in the maſter.—Beſides, as the manumiſſion of the *Mokâtib*'s *Mokâtib* may lawfully be referred to the maſter of the *Mokâtib* on the inſtant of the contract, it follows that where it is impoſſible to refer it to the contracting party himſelf, becauſe of his incompetency, it muſt be referred to his maſter;—in the ſame manner as holds with reſpect to a ſlave licenced to trade; that is to ſay, if a ſlave licenced to trade purchaſe any thing, the property thereof veſts in his maſter, as it cannot veſt in the ſlave, ſince he is incapable of poſſeſſing property.—If, alſo, the *Mokâtib* ſhould aſterwards diſcharge his ranſom, and become free, ſtill the *Willa* of his *Mokâtib* does not ſhift to him, becauſe his maſter had already been conſtituted the emancipator, and *Willa* cannot ſhift from the emancipator.—If, on the contrary, the *Mokâtib*'s *Mokâtib* pay the ranſom to the *Mokâtib* after he [the firſt *Mokatib*] has obtained his freedom, the *Willa* [of the ſecond *Mokâtib*] reſts with him [the firſt *Mokâtib*,] becauſe in this inſtance the party to the ſecond contract of *Kitàbat* is capable of having a right of *Willa* eſtabliſhed in him. Beſides, he is the original, or (in other words) the *perſonal* emancipator, and is conſequently entitled to the *Willa*.

He cannot emancipate his ſlave for a compenſation; or contract his *male* ſlave in marriage:

IF a *Mokâtib* emancipate his ſlave in return for property, or ſell his ſlave into his own hands, or contract him in marriage, it is unlawful, as none of theſe acts are either an acquiſition of property, or an appurtenance to acquiſition of property:—the firſt (namely, emancipation in return for property) is not ſo, becauſe that is a dereliction of right of property in the ſlave's perſon, and the eſtabliſhment of it is a debt upon one who is poor; nor is the ſecond ſo, becauſe that is alſo, in effect, a manumiſſion in return for property; neither is the third ſo, becauſe the act of contracting the ſlave in marriage vitiates and diminiſhes his value, and cauſes him to be occupied in diſcharging the debt of dower, and providing his wife a ſubſiſtance:—in oppoſition to contracting a *female* ſlave in marriage, as that is an acquiſition of property, ſince by it the dower is obtained, as was before explained.

(and the ſame rule holds with reſpect to a *guardian*,

A FATHER or executor[*] ſtand, with reſpect to their infant ward, in the ſame predicament as a *Mokâtib* with reſpect to his ſlave;—that is to ſay, it is unlawful for them to contract the [male] ſlave of their ward in marriage, or to emancipate him, or to ſell him into his own hands. But it is lawful for them to contract in marriage his *female* ſlave, or to enter into a contract of *Kitàbat* with his male or female ſlave, becauſe it is lawful for them to acquire property on behalf of their infant ward in the ſame manner as a *Mokâtib*; and alſo, becauſe contracting his female ſlave in marriage, or making his male or female ſlave *Mokâtib*, is conducive to his intereſt, whereas any thing beyond this is not ſo; and their authority is eſtabliſhed in regard to their ward with a view to his intereſt.

or a licenſed ſlave.)

A MAZOON, or ſlave licenced to trade, cannot lawfully perform any of the acts above deſcribed; that is to ſay, he can neither contract his male or female ſlave in marriage, nor make his ſlave a *Mokâtib*, nor emancipate him in return for property, nor ſell him into his own hands.—This is according to *Haneefa* and *Mohammed*.—*Aboo Yooſaf* maintains that he is at liberty to contract his *female* ſlave in marriage.—The ſame difference of opinion obtains with reſpect to a *Mozâribat* manager, a partner under partnerſhip by reciprocity, and alſo a partner under partnerſhip in arts; for *Aboo Yooſaf* conceives an analogy between thoſe and a *Mokâtib*; and as a *Mokâtib* is at liberty to contract his female ſlave in marriage the ſame is lawful to theſe likewiſe.—He, moreover, conceives an analogy between contracting a female ſlave in marriage, and letting her out to hire;—that is to ſay, as it is lawful for a *Mazoon*, a *Mozâribat* manager, &c. to let their female ſlave to hire, ſo in the ſame manner it is lawful for them to contract her in marriage, becauſe contracting her in marriage and letting her out to hire are both equally cauſes of advantage.—The arguments of *Haneefa* and *Mohammed* upon this point are twofold. First, the ſlave in queſtion is merely empowered to trade, and contracting his female ſlave in marriage is not a tranſaction of trade, becauſe trade is an exchange of property for property, and contracting in marriage is not of this nature, ſince the connubial enjoyment is not property, evidently.—Contracting in marriage, therefore, reſembles *Kitàbat*; and as they are not empowered to make a ſlave *Mokâtib*, ſo in the ſame manner they are not empowered to contract a female ſlave in marriage. A *Mokâtib*, on the contrary, is empowered to acquire property; and the contracting his female ſlave in marriage is one mode of acquiring property.—Secondly, contracting a female ſlave in marriage is an exchange of property for what is not property. It therefore reſembles *Kitàbat*, and not *hire*, as that is an exchange of property for property, ſince uſufruct, in hire, ſtands in the place of property. It being therefore proved that contracting a female ſlave in marriage reſembles *Kitàbat*, and a contract of *Kitàbat* being unlawful to the ſlave in queſtion, it follows that contracting his female ſlave in marriage is likewiſe unlawful to him.

---

[*] The term *Waſſee*, in this place, ſignifies a guardian appointed by will; in oppoſition to a *Wallee*, or *natural* guardian.

SECTION.

The parent or child of a *Mokâtib*, purchaſed by him, are included in his *Kitàbat*;

If a *Mokâtib* purchaſe his father or his ſon, they are included in his *Kitàbat*;—that is to ſay, they become *Mokâtibs* dependantly;—becauſe, as a *Mokâtib* poſſeſſes capacity to make a *Mokâtib*, although he be not capable of granting emancipation, they therefore are rendered *Mokâtibs*, in order that the ties of kindred may be as far as poſſible preſerved; for as, if their relation, being a freeman, were to become poſſeſſed of them, they would alſo become free, in conſequence of a freeman being empowered to beſtow manumiſſion upon his ſlave, ſo in the ſame manner they in the preſent inſtance become *Mokâtibs*, in conſequence of the *Mokâtib* in queſtion being empowered to create his ſlave a *Mokâtib*.

but relations not within the degree of paternity are not ſo included.

If a *Mokâtib* purchaſe a kinſman related to him within the prohibited degrees, but not within the degree of paternity, he is not included in his *Kitabat*, according to *Haneefa*.—The two diſciples alledge that he alſo is included in his *Kitàbat*, in the ſame manner as a paternal relation, as the obligations of kindred extend equally to both, whence it is that the prohibited relation of a freeman becomes free upon being purchaſed by him.—The arguments of *Haneefa* upon this point are twofold.—First, a *Mokâtib* is empowered with reſpect to the acquiſition of property, but not with reſpect to the property acquired.—The power he enjoys, however, of acquiring property, ſuffices for the performance of the duties of paternity, whence it is incumbent upon a perſon enabled to acquire property, to afford ſubſiſtence to his parents and children,—but it does not ſuffice for the performance of any other than the duties of paternity, whence the ſubſiſtence of a brother is not incumbent except upon a wealthy brother.—Secondly, the fraternal affinity is a medium between the avuncular which is diſtant, and the paternal which is near; and it is accordingly referred to the paternal with reſpect to freedom, and to the avuncular with reſpect to *Kitàbat*;—and this arrangement is preferable to the reverſe, becauſe manumiſſion is more extenſive in its operation than *Kitàbat*, inſomuch that if one of two partners make his ſhare in a ſlave *Mokâtib*, the other partner is at liberty to annul it,—whereas if one were to *emancipate* his ſhare, the other could not annul it.

His child, born of his *Am-Walid*, is included; and the *Am-Walid* cannot be ſold.

If a *Mokâtib* purchaſe his *Am-Walid*, (that is, his wife, whom he married when ſhe was the ſlave of another, and who has borne a child to him,) his child born of her is included in his *Kitàbat*, and it is unlawful for him to ſell the *Am-Walid*.—The child becomes a *Mokâtib*, becauſe of what was before ſaid "in order "that the ties of kindred may be as far as poſſible preſerved:"—and the mother cannot lawfully be ſold, as ſhe is a dependant of her child in effect, the prophet having ſaid (ſpeaking of an *Am-Walid*) "*her* "*child hath ſet her free.*"—What is here advanced proceeds on the ſuppoſition that the *Mokâtib* becomes proprietor of the *Am-Walid*, together with her child. If it be otherwiſe, he having purchaſed her alone, in that caſe alſo the ſame effect obtains, according to *Aboo Yooſaf* and *Mohammed*, becauſe of her being his *Am-Walid:* in oppoſition to *Haneefa*, who contends that ſhe may in this caſe be lawfully ſold; becauſe analogy ſuggeſts that the ſale of her is lawful notwithſtanding he become poſſeſſed of her along with her child; for the right over property of a *Mokâtib*'s earning is ſuſpended, (ſince, if he pay his ranſom, it becomes appropriated to him, or if he fail in this, it becomes appropriated to his maſter,) and ſuch being the caſe, no right incapable of diſſolution can be connected with it, for if ſo, it would follow that ſuch right is annulled upon the *Mokâtib* failing to pay his ranſom; and the prohibition againſt ſelling her, on account of her being an *Am-Walid*, is incapable of annulment. The right in queſtion, however, is eſtabliſhed with reſpect to her, dependantly, in a caſe where he becomes poſſeſſed of her together with her child, becauſe of that right being eſtabliſhed with reſpect to the child; whereas if it were eſtabliſhed independant of the child, it would follow that the right in queſtion is eſtabliſhed with reſpect to her *prima facie*, to which analogy is repugnant.

His child, born of his ſlave, is alſo included; and its earnings appertain to him.

IF a child be born to a *Mokâtib*, by his female ſlave, it is included in his *Kitâbat*, for the reaſon aſſigned in the preceding example; and the child becomes ſubject to the ſame rules with the *Mokâtib*. The earnings of the child are therefore the earnings of the *Mokâtib*, as being the earnings of the *Mokâtib*'s earnings; wherefore the *Mokâtib*'s excluſive right to thoſe earnings cannot be affected by any claim which may be afterwards ſet up to them.

The child of a *Mokâtibá* is included in her *Kitàbat*, and cannot be ſold.

If a *Mokâtibá* bear a child to her huſband, ſuch child is included in her *Kitàbat*; and the ſale of it is unlawful, becauſe as the right of being unſaleable is eſtabliſhed with reſpect to the *Mokâtibá*, it conſequently extends to her child, in the ſame manner as *Tadbeer* or *Iſteelad*. (The caſe of *Iſteelad*, here alluded to, is where a perſon contracts his *Am-Walid* in marriage to another, and ſhe bears a child,—in which caſe that perſon cannot lawfully ſell the child, as the unſaleableneſs of the *Am-Walid* extends to her offspring.)

A child begot by a *Mokâtib* upon a *Mokâtibá*, is included in the *Kitàbat* of the *mother*.

If a perſon contract his female ſlave in marriage to his male ſlave, and afterwards create them both *Mokâtibs*, and they have a child, it is included in the *Kitàbat* of the mother, and its acquiſitions appertain to her; becauſe the dependance on the *mother* has the ſuperiority, as the qualities eſtabliſhed in the mother extend to her offspring; and accordingly, a child is a dependant of its mother with reſpect to *bondage* and *freedom*.

The children of a *Mokâtib* by a woman who proves a ſlave are ſlaves, and cannot be demanded by him.

If a *Mokâtib* marry, with the conſent of his maſter, a woman who declares herſelf free, and they have children, and the woman be afterwards claimed as a ſlave, their children are in ſuch caſe ſlaves *, and the father is not entitled to demand them for their value; and ſo likewiſe, if a *ſlave* marry, with the conſent of his maſter, a woman under ſuch circumſtances. This is according to *Haneefa* and *Aboo Yooſaf*. *Mohammed* alleges that the children are free for their value; in other words, the father is entitled to take them upon paying their value, and they then are free; the reaſon of which is, that as the ſlave or *Mokâtib* married the woman purely under the idea that his children ſhould be free, they are therefore in the ſame predicament with the ſlave of a *Magroor*, or perſon acting under a deception. The argument of the two diſciples is, that as the children in queſtion are the offspring of *two ſlaves*, (for their father and mother are both ſlaves,) it follows that they alſo are ſlaves.—The ground of this is that it is a rule that a child is a dependant of its mother with reſpect to bondage and freedom.—This rule is, however, abandoned in the caſe of a free perſon acting under a deception, by all the companions. But a ſlave or a *Mokâtib*, acting under a deception, are not in the preciſe predicament with a *free* perſon ſo acting; becauſe, where the perſon who acts under a deception is *free*, he may be ſued for the value of his child *upon the inſtant*, (according to *Mohammed*,) whereas a *Mokâtib*, *Modabbir*, or *ſlave* ſo circumſtanced, in caſe of having married without their owner's approbation, cannot be ſued for the value of their child until after they have themſelves become free.—As therefore a ſlave or a *Mokâtib*, acting under a deception, are not in the preciſe predicament with a free perſon ſo acting, it follows that their child muſt not be confounded with the child of a deceaſed *free-man*, but continues in its original ſtate.

---

* To the owner of the *mother*.

Caſe of a *Mokâtib* cohabiting with the ſlave of another without his conſent.

IF a *Mokâtib* have carnal connexion with the female ſlave of another, in virtue of a ſuppoſed right of bondage, without the conſent of her maſter, (in this way, that he purchaſes a ſlave, and cohabits with her, and the ſlave afterwards proves the property of another,) he muſt in this caſe pay * an *Akir*, or fine of treſſpaſs, to the value of her proper dower, and is liable to be ſued for it during the term of his *Kitàbat*. If, on the contrary, he had cohabited with the ſlave in virtue of *marriage* †, he could not be ſued for the fine until he had obtained his freedom. A *Mazoon*, or ſlave licenſed to trade, is alſo ſubject to the ſame rule. The difference between a caſe of cohabitation in virtue of a right of bondage and in virtue of marriage is, that in the former caſe a *debt* is eſtabliſhed with reſpect to the maſter; becauſe a contract of *Kitàbat* comprehends traffic and its incidents; and the fine is an incident of traffic, and muſt be referred thereto; for if the *Mokâtib* had not purchaſed the ſlave, he could not eſcape puniſhment, ſince where puniſhment is not remitted the fine is not due: hence the fine is regarded as *a debt of trade.* In the *ſecond* caſe, on the contrary, the debt is not eſtabliſhed with reſpect to the maſter; becauſe in this inſtance the obligation of the fine is on account of an erroneous marriage; and as marriage is neither a branch of traffic nor a means of acquiring property, it is not comprehended in a contract of *Kitàbat*, in the ſame manner as *bail* is not comprehended therein.—The payment of the fine, therefore, in this inſtance, is delayed until the *Mokâtib* ſhall have become free; in the ſame manner as, if a *Mokâtib* enter into a contract of bail, he cannot be ſued upon it until he have obtained his freedom, bail not being a branch of traffic.

---

* To her maſter.

† Without the conſent of her owner.

If a *Mokâtib* purchaſe a female ſlave by an invalid contract, and cohabit with her, and then return her to her owner, he may be ſued for the fine during his *Kitàbat*; and the ſame of a *Mazoon*, or ſlave licenſed to trade; becauſe this is a circumſtance appertaining to traffic; and tranſactions are ſometimes valid and ſometimes invalid; and *Kitàbat* and licenſe to trade comprehend both valid tranſactions and invalid; in the ſame manner as agency;—in other words, if a perſon appoint another his agent for purchaſe or ſale, (for inſtance,) the agency comprehends both valid and invalid purchaſe or ſale; and ſo alſo in the preſent inſtance.—The tranſaction is therefore eſtabliſhed as affecting the maſter.

SECTION.

A *Mokatibâ*, bearing a child to her maſter, may undo the contract, and

If a female ſlave, having been made a *Mokâtibâ*, bear a child to her maſter, ſhe has it at her option either to adhere to the contract of *Kitàbat*, or to incapacitate herſelf from paying ranſom, and to become an *Am-Walid* to her maſter; becauſe here exiſts two cauſes of freedom, become his *Am-Walid:*

dom, in virtue of one of which freedom may be obtained immediately, but for a conſideration,—and in virtue of the other it may be obtained after delay, but without any conſideration.—She has therefore an option of either.—The parentage of her child is moreover eſtabliſhed in the maſter, and the child is conſequently free, although it be an acquiſition of the female ſlave; becauſe the claim laid to it by the maſter is tantamount to manumiſſion; and as the maſter has it in his power, without any particular motive, to emancipate the child where it is *not* ſprung from him, it follows that he is entitled, *a ſuperiori*, to emancipate it under a claim; and the maſter's right of property, exiſting with reſpect to the ſlave, ſuffices for the purpoſe of rendering valid *Iſteelâd* under a claim. It is to be obſerved that if the female ſlave in queſtion adhere to her contract of *Kitàbat*, ſhe is entitled to a fine of *Akir* from her maſter, becauſe her perſon and the uſe of it are her excluſive right, as was before explained.

or, if ſhe adhere to the contract, ſhe nevertheleſs becomes free upon his deceaſe, without ranſom.

IF the *Mokâtibâ*, in the above example, adhere to the contract of *Kitàbat*, and her maſter die, ſhe becomes free, as being his *Am-Walid*; and her ranſom is remitted. If, on the contrary, ſhe ſhould die, and leave property, her ranſom is paid out of that property, and whatever remains goes to her child, in virtue of inheritance, according to the intendment of the contract. If, however, ſhe leave no property, yet her child is not required to perform emancipatory labour, as it is free at all events.

If ſhe bear a *ſecond* child, and die inſolvent, this child muſt perform emancipatory labour, unleſs the maſter father it.

IF the *Mokâtibâ* mentioned in the above example bring forth *another* child, it is not incumbent upon the maſter to father it; becauſe it is not lawful for him to have carnal connexion with her.—If, therefore, the maſter ſhould not claim this child, and ſhe die, without leaving effects to diſcharge her ranſom, this child muſt perform emancipatory labour, as being a *Mokâtib*, in conſequence [as a dependant] of the mother.—If, however, the maſter afterwards die, the child is free, and is excuſed from emancipatory labour, as ſtanding in the predicament of an *Am-Walid*; for it is the offſpring of an *Am-Walid*, and conſequently partakes of her priviledges as a dependant of her.

An *Am Walid* may be conſtituted a *Mokâtibâ*;

If a maſter enter into a contract of *Kitàbat* with his *Am-Walid*, it is lawful; becauſe ſhe is here deſirous of obtaining her freedom *before* the deceaſe of her maſter, and this end is obtained by means of a contract of *Kitàbat*: neither is her being an *Am-Walid* at all repugnant to the contract of *Kitàbat*, ſince both thoſe means of freedom may unite in her, and ſhe may obtain her freedom, in virtue of the one immediately, by the payment of her ranſom,—or, in virtue of the other, after a delay, independant of ranſom.—The contract in queſtion is therefore valid.—But if her maſter afterwards die, ſhe becomes free in virtue of being an *Am Walid*, as her freedom was ſuſpended upon his deceaſe:—and in this caſe ſhe is excuſed from the ranſom; becauſe her deſign, in entering into the contract, and engaging for a ranſom, was merely to procure her freedom upon paying it; but as ſhe here becomes free *before* having paid it, it is impoſſible for her to acquire freedom ***upon*** paying it, ſince a thing already obtained cannot be obtained again.—Her ranſom therefore drops, and the contract of *Kitàbat* becomes null, as its continuance is in this caſe uſeleſs.

Objection.—As the contract of *Kitàbat* is annulled and broken off by the maſter's deceaſe, it would follow that the acquiſitions of the *Mokâtibâ*, together with the children not begotten by her maſter, and born during the *Kitàbat*, appertain to the maſter's eſtate;—whereas it is not ſo.

Reply.—The contract of *Kitàbat* is annulled with reſpect to the ranſom, but remains in force with reſpect to the acquiſitions and children of the *Mokâtibâ*; becauſe the annulment of the contract is out of tenderneſs to her intereſt, which is obſerved in annulling it with reſpect to the ranſom, but not with reſpect to thoſe other particulars, for if it were annulled with reſpect to them, it would follow that they became the property of the maſter's heirs.

And the ſame of a *Modabbirá.*

IF a perſon enter into a contract of *Kitàbat* with his *Modabbirá*, it is lawful, for the reaſon aſſigned in the preceding example, that "ſhe "is deſirous of obtaining her freedom *before* the deceaſe of her "maſter:"—neither is her being a *Modabbirá* repugnant to the contract of *Kitàbat*; for ſhe is not, in virtue of *Tadbeer*, free at *preſent*, but is merely endowed with a right to *ultimate* freedom, upon the deceaſe of her owner. If, in this inſtance, the maſter die, leaving no property except the *Modabbirá* in queſtion, ſhe has it at her option to perform emancipatory labour, either for two thirds of her eſtimated value, or for the whole of her ranſom. This is according to *Haneefa. Aboo Yooſaf* holds that ſhe is to perform emancipatory labour to a degree equivalent to the leaſt of the two.—*Mohammed* maintains that ſhe is to perform emancipatory labour to the amount of what is leaſt, two thirds of her value, or two thirds of her ranſom. Thus there is a difference of opinion with reſpect both to the *amount* and the *option*; and *Aboo Yooſaf* coincides with *Haneefa* in regard to the one, and with *Mohammed* in regard to the other. The right of option, in this inſtance, is derived from the diviſibility of manumiſſion, as maintained by *Haneefa*; becauſe as (according to him) manumiſſion admits of being divided into parts, one third of the *Modabbirá* becomes free on the inſtant, and two thirds continue in bondage;—and as two cauſes of manumiſſion operate, with reſpect to the other two thirds, for two different conſiderations, (one of which is of immediate effect, in virtue of *Tadbeer*, and the other of deferred effect, in virtue of *Kitàbat*,) the *Modabbirá* has therefore an option of either. According to the two diſciples, on the contrary, manumiſſion is indiviſible. Hence the *whole* of the *Modabbirá* is free in conſequence of a *part* of her being ſo; and ſhe, as being conſequently free, owes one of the two conſiderations, of which ſhe will undoubtedly prefer paying that which is the *ſmalleſt*. Her having an option is therefore uſeleſs.—With reſpect to the point on which *Mohammed* differs both from *Haneefa* and from *Aboo Yooſaf*, namely the amount, the argument he urges is that the maſter had oppoſed the whole ranſom to the whole of the *Modabbirá's* perſon; but ſhe has already ſecured to herſelf *one* third of the whole in virtue of *Tadbeer*, and it is conſequently impoſſible that any ranſom ſhould be due for that third; for as, if ſhe had ſecured her *whole* perſon to herſelf, by that conſtituting only a third of the deceaſed's property, the whole of her ranſom would have been remitted, it follows that one third is remitted in the preſent inſtance;—in the ſame manner as where a maſter firſt makes his ſlave a *Mokâtib*, and then grants him *Tadbeer*,—in which caſe one third of his ranſom is remitted,—and ſo likewiſe in the caſe in queſtion.—The argument of the two *Elders* is that the whole of the *Kitàbat* is oppoſed to two thirds of the *Modabbirá*, and conſequently no part of it can be remitted. The ground of this is that the ranſom, although it be oppoſed to the *whole* of the *Modabbirá* in regard both to *appearance* and *letter*, is nevertheleſs reſtricted to two thirds of her in regard to *reality* and *deſign*; becauſe ſhe has already become, in appearance, entitled to the freedom of one third of her perſon; and it is evident that men do not engage for property, as oppoſed to a thing to the freedom of which they are already entitled;—as, for inſtance, if a perſon pronounce two divorces upon his wife, and afterwards agree "to give her three divorces for one thouſand *dirms*," the whole thouſand are oppoſed to the one remaining divorce required to make up that number, becauſe apparent circumſtances argue that ſuch is his deſign, ſince only one divorce remains to be given;—and ſo likewiſe in the preſent inſtance.—It is otherwiſe where a maſter firſt creates his ſlave a *Mokâtibá*, and afterwards grants her *Tadbeer*, for in that caſe the ranſom was oppoſed to her *whole* perſon, as ſhe was not at the time of concluding the contract of *Kitàbat*, entitled to the freedom of any part of her perſon.—There is therefore an evident difference between the caſes.

A *Mokâtibá* may be conſtituted a *Modabbirá*.

If a perſon grant *Tadbeer* to his *Mokâtibá*, it is lawful; becauſe ſhe ſtands in need of freedom; and her becoming a *Modabbirá* is not repugnant to the contract of *Kitàbat*, as was before ſtated. In this caſe the ſlave has it at her option either to adhere to the contract of *Kitàbat*, or to incapacitate herſelf from paying ranſom, and to become

Digitized by Google

come a *Modabbirá*, becauſe a contract of *Kitàbat* is not binding on the part of a ſlave*. If, therefore, ſhe adhere to the contract, and her maſter die, and leave no property beſides, ſhe has it at her option to perform emancipatory labour, either for two thirds of her ranſom, or for two thirds of her eſtimated value.—This is according to *Haneefa*. The two diſciples maintain that ſhe has no option, but is to perform emancipatory labour for that which is the leaſt of the two. Thus the difference, in this caſe, concerns only the *option*, in conſequence of that being derived (according to *Haneefa*) from the diviſibility of manumiſſion, as before ſet forth; for they all agree concerning the *amount*, ſince in this inſtance the ranſom is oppoſed to the *whole* of the ſlave's perſon, as was explained above.

A *Mokâtib* may be emancipated *gratis.*

IF a maſter grant manumiſſion to his *Mokâtib*, he is accordingly free, becauſe the maſter is proprietor of his perſon, and therefore poſſeſſes the power of emancipating him:—and in this caſe the ranſom is remitted from the *Mokâtib*; becauſe he engaged for it ſolely as oppoſed to his emancipation; but as that has been obtained without ranſom, it is conſequently not due.

OBJECTION.—It would here appear that the *Mokâtib* is not free, as the contract of *Kitàbat* is binding on the part of his maſter.

REPLY.—Although the contract of *Kitàbat* be binding on the part of the maſter, yet it may be broken with the conſent of the *Mokâtib*; and it is evident that the *Mokâtib* conſents to the breach of it in the preſent inſtance, in order that he may be emancipated without paying ranſom. Notwithſtanding this, however, his acquiſitions remain ſecured to him; becauſe the contract is annulled only with reſpect to the ranſom, out of tenderneſs to his intereſt.

---

* That is to ſay, a ſlave is at liberty to break off, or fail in, the fulfilment of a contract of *Kitàbat*, although the *maſter* have not this liberty.

An abatement may be made from the ranſom, in conſideration of prompt payment.

If a perſon create his ſlave a *Mokâtib*, in conſideration of one thouſand *dirms*, on a credit of one year, and afterwards enter into a compoſition with him for five hundred *dirms* prompt payment, it is lawful, on a favourable conſtruction. Analogy would ſuggeſt that it is unlawful, becauſe it would hence appear that the maſter had in this inſtance oppoſed one thouſand *dirms* to five hundred *dirms*, and credit for one year, which, as credit is not property, and as the debt of ranſom is property, would be uſurious;—whence it is that a tranſaction of the nature here deſcribed is not lawful with reſpect to a freeman, or the *Mokâtib* of a ſtranger;—that is to ſay, if a perſon have a deferred debt owing to him from a freeman, and compound with him for one half of his right, prompt payment, it is unlawful;—and in the ſame manner, if a perſon have a deferred debt owing to him from the *Mokâtib* of a ſtranger, and compound with him on the ſame terms, it is alſo unlawful. The reaſons, however, for a more favourable conſtruction of the law in this particular are twofold.—First, the credit granted to the *Mokâtib*, although in one ſhape it be not property, yet is in another ſhape property; for as the *Mokâtib* is unable to pay his ranſom but by means of the credit, it follows that the credit is virtually property with reſpect to him. The ranſom, on the other hand, although it be property in one ſhape, yet is not ſo in another ſhape, inſomuch that bail cannot be given for it.—The credit, therefore, ſtands upon the ſame footing with the ranſom:—conſequently, the tranſaction was only the acceptance of a conſideration of what was property in one ſhape in return for what was alſo property in one ſhape; and as the conſideration and the return were of different kinds, there was therefore no uſury in it.—Secondly, A contract of *Kitàbat* is a contract in one ſhape;—but it is not ſo in another ſhape; becauſe a maſter cannot have a claim for debt upon his ſlave, and alſo becauſe it [the contract] has a ſemblance to *Yameen*, or conditional vow, as it is a ſuſpenſion of emancipation upon the payment of a conſideration.—The ſum of five hundred *dirms*, alſo, oppoſed to the credit, is uſury in one ſhape but not in another, for if the credit granted be not accounted property, it is uſury,—whereas if the credit *be* accounted property, uſury is not induced, ſince in ſuch caſe it is merely property oppoſed to property. The uſury, therefore, is at all events dubious; and where dubious uſury occurs in a contract which is itſelf of a dubious nature, it is *doubly* dubious, and conſequently is not regarded.—It is otherwiſe in a contract between two freemen, as that is in every ſhape a contract, and conſequently the circumſtance of a credit being granted in it occaſions a ſemblance of uſury.

If a ſick perſon * enter into a contract of *Kitàbat* in conſideration of two thouſand *dirms*, on a credit of one year, with his ſlave whoſe value is *one* thouſand, and afterwards die, leaving no other effects but this ſlave, and the heirs of the deceaſed had not acceded to the credit granted, in this caſe he [the ſlave] muſt pay two thirds of his *Kitàbat* immediately, and agree to pay the remainder within the term of credit, or he again becomes an abſolute ſlave.—This is according to *Haneefa*.—According to *Mohammed* he muſt pay two thirds of *one* thouſand immediately, and the remainder within the term of credit; becauſe as it would have been lawful for the maſter to have remitted the remainder altogether, by making the ſlave a *Mokâtib* in conſideration only of his *value*, it follows that he was at liberty to poſtpone it to the term of credit ſpecified;—in the ſame manner as where a ſick perſon enters into an agreement of *Khoola* with his wife, in conſideration of one thouſand *dirms*, on a credit of one year, and dies, leaving no property except thoſe thouſand *dirms*, and his heirs had not acceded to the credit granted the wife;—for in this caſe the credit is nevertheleſs valid with reſpect to the whole ſum mentioned; becauſe as the deceaſed was at liberty to have pronounced a divorce upon his wife without receiving any conſideration, it was conſequently in a ſuperior

A credit granted with reſpect to the ranſom, without the conſent of the maſter's heirs, expires upon his deceaſe; and the *Mokâtib* muſt pay them two thirds of it immediately;

---

* Arab. *Mareez*;—always (in the language of the LAW) meaning a *dying* perſon. The caſe here conſidered turns entirely upon the general rule, that a dying perſon is not at liberty to perform any act which might have a tendency to affect the right of his heirs, beyond *one third* of his eſtate.

degree lawful for him to poſtpone the payment to the term of credit ſpecified.—The argument of the two *Elders* is, that the ſum in queſtion (namely the two thouſand) is the conſideration for the *whole* of the ſlave's perſon, whence it is that the laws concerning conſiderations obtained with reſpect to it;—and as the right of the heirs is connected with the return, namely, with the ſlave's perſon, ſo it is in the ſame manner connected with the conſideration for the perſon.—Now agreeing to poſtpone the conſideration is in one ſhape a dereliction; and it is therefore regarded as applying to one third of the whole property named. It is otherwiſe in the caſe of *Khoola*; becauſe as, in that caſe, the conſideration is not oppoſed to property, the right of the heirs is not connected with the return, namely, the uſe of the woman's perſon, whence it is that their right is alſo unconnected with the conſideration for it.—Analogous to the difference of opinion in the preſent inſtance, is that which obtains in the caſe of a ſick perſon ſelling his houſe, valued at one thouſand *dirms*, for three thouſand, on one year's credit, and then dying, and leaving no effects except the price abovementioned;—for in this caſe, according to the two *Elders*, the purchaſer muſt be required to pay down two thirds of the whole price immediately, and the remainder within the time promiſed, or to diſſolve the contract of ſale;—whereas, according to *Mohammed*, regard is had to the third of the *value*, not to the third of what *exceeds* the value;—the reaſons of which have been explained above.

or two thirds of his *value*, if the ranſom fall ſhort of that.

If a ſick perſon make his ſlave, valued at two thouſand *dirms*, a *Mokâtib* for one thouſand, on a credit of one year, and then die, leaving no property except the *Mokâtib*, and the heirs do not confirm the credit, he [the *Mokâtib*] muſt pay down two thirds of his value immediately, or he again becomes an abſolute ſlave, according to all our doctors; becauſe as this caſe involves a *Mohabât* with reſpect both to the ſlave's value and to the credit granted, regard is therefore had to one third with reſpect to both.

CHAP.

CHAP. IV.

Of a Perſon tranſacting a *Kitàbat* on behalf of a Slave.

A ſlave is free upon another perſon engaging for and paying his ranſom; or, on acceding to the engagement he becomes a *Mokâtib.*

If a freeman agree to a contract of *Kitàbat* on behalf of a ſlave, on a conſideration of one thouſand *dirms*, in this caſe, provided he pay thoſe thouſand on behalf of ſuch ſlave, he [the ſlave] is free; or, if the ſlave receive intelligence of the contract, and accede to it, he becomes a *Mokâtib*. The nature of this caſe is that a free perſon ſays to the maſter of a ſlave, "make your ſlave a *Mokâtib*, in conſideration of one "thouſand *dirms*, on this condition, that if I pay you the ſaid thou-"ſand, he ſhall be free,"—and the maſter accordingly makes his ſlave a *Mokâtib*,—in which caſe he [the ſlave] is made free by the freeman in queſtion paying the money, agreeably to ſtipulation:—and if the ſlave accede upon receiving intelligence of the tranſaction, he becomes a *Mokâtib*, becauſe the contract was ſuſpended upon his conſent, and his acquieſcence is conſent.—If, in this caſe, the freeman in queſtion were not to add, as above, "on this condition, that if I pay you the "ſaid thouſand, he ſhall be free," and afterwards pay the money, ſtill analogy would ſuggeſt that the ſlave is not thereby emancipated, becauſe in this inſtance no ſtipulation has been made for his freedom, and the contract is ſuſpended, in its effect, upon his conſent. He is, however, emancipated in this caſe alſo, on a favourable conſtruction, becauſe an abſent ſlave ſuſtains no injury from his freedom being ſuſpended on the condition of a freeman paying his ranſom. The contract of *Kitàbat* is therefore valid in this inſtance alſo, and remains ſuſpended, in its effect, upon the aſſent of the ſlave, merely with reſpect to the thouſand *dirms* being obligatory upon *him*.—(Some ſay that this is the caſe ſtated by *Kadooree*.)—It is to be obſerved that, in this caſe, the freeman, where he pays the ranſom himſelf, is not entitled to any thing from the ſlave, becauſe in ſo doing he acted gratuitouſly.

Caſe of a ſlave engaging in a *Kitàbat* for himſelf and another ſlave.

If a ſlave agree to a contract of *Kitàbat* on behalf of himſelf and another ſlave, who is the property of his maſter, and abſent,—in this caſe, whether the ranſom be paid by the ſlave preſent, or by the abſentee, they are both emancipated.—The nature of this caſe is that a ſlave ſays to his maſter, "make me a *Mokâtib*, together with ſuch an "abſent ſlave, in conſideration of one thouſand *dirms*," and the maſter makes them *Mokâtibs* accordingly,—which is valid, on a favourable conſtruction.—Analogy would ſuggeſt that the contract is valid with reſpect to the preſent ſlave only, as he has a power over his own perſon;—but that it is ſuſpended with reſpect to the abſentee, as the one who is preſent has no power over *his* perſon.—The reaſon for a more favourable conſtruction is, that the preſent ſlave, in firſt referring the contract to himſelf, rendered himſelf the principal, and the abſentee a dependant;—and a contract of *Kitàbat* of this nature is agreeable to law;—as where, for inſtance, a female ſlave is created a *Mokàtibâ*, in which caſe her children are included in her contract of *Kitàbat*, inſomuch that they alſo become free upon her paying the ranſom, without any thing being incumbent upon them.—It being therefore poſſible, in this way, to allow validity to the contract, the preſent ſlave is conſequently empowered to agree to the contract by himſelf; and hence the maſter is entitled to take the whole ranſom from him, [the preſent ſlave,] ſince, as he is principal, it all reſts upon him: but nothing is incumbent upon the abſentee, as he is merely a dependant.—Whoever, alſo, of the two ſlaves, pays the ranſom, they are both free: and the maſter may be compelled to receive it from whoever of them makes a tender of it;—from the *preſent* ſlave, becauſe it is from him that the debt is due; for from the *abſent* ſlave, becauſe, although the debt be not due from him, yet it is by the payment thereof that he obtains his freedom;—in the ſame manner as where a pawner makes a tender of his debt; in which caſe the pawnholder

holder may be compelled to accept it, becauſe of the pawner having occaſion to redeem his pledge, although there be no debt upon his *perſon*. Upon either of the ſlaves in queſtion paying the ranſom, he has no claim whatever againſt the other; becauſe if the *preſent* ſlave paid it, he in ſo doing paid a debt which was owing by him; or if the *abſentee* paid it, he in ſo doing acted voluntarily, ſince he was under no neceſſity to pay it. It is to be obſerved that the maſter, in this caſe, cannot ſue the abſentee ſlave for any thing; becauſe he undertook for nothing, being merely a dependant, it being the ſame thing whether he conſented to the contract or not. As, moreover, the contract in queſtion is binding upon the *preſent* ſlave, becauſe of its operating upon him independant of the abſentee's aſſent, it follows that no change is wrought in it by ſuch aſſent,—in the ſame manner as where a perſon becomes bail for another without his deſire, and he, upon hearing of it, gives his aſſent; in which caſe the effect of the bail is not altered, inſomuch that if the perſon who thus gave bail ſhould pay any thing on that account, the creditor has no claim upon the perſon bailed; and ſo alſo in the preſent inſtance.

Caſe of a female ſlave engaging in a *Kitâbat* for herſelf and her children.

IF a female ſlave agree to a contract of *Kitâbat* on behalf of herſelf and of her two infant children, it is lawful;—and whoever of them pays the ranſom has a claim upon the others for their proportions;—and upon any one of them paying the ranſom they are all free; becauſe the female ſlave conſtituted herſelf the principal, and her children the dependants, for the reaſons ſtated in the preceding example; and ſhe was ſtill more competent than a *ſtranger* ſo to do.

CHAP.

CHAP. V.

Of the *Kitàbat* of *Partnerſhip Slaves.*

Caſe of a partnerſhip ſlave, made *Mokâtib* by one of two partners, paying part of his ranſom, and failing with reſpect to the *complete* diſcharge of it.

If a ſlave be held in partnerſhip between two men, and one of them give permiſſion to the other to create his ſhare in the ſlave *Mokâtib*, in conſideration of one thouſand *dirms*, and that he ſhall take poſſeſſion of the ſaid ranſom, and this partner accordingly create his ſhare *Mokâtib*, and receive a part of the ranſom, and the ſlave afterwards become incapable of completely diſcharging it, he [the contracting partner] is in this caſe entitled to retain the part he has received, according to *Haneefa*. The two diſciples maintain that the ſlave becomes a *Mokâtib*, in equal proportions, to both maſters, and that, conſequently, what he has paid is ſhared equally between them.—The ground of this difference of opinion between our doctors is, that *Kitàbat* is ſuſceptible of diviſion according to *Haneefa*, but not according to the two diſciples; in the ſame manner as holds with reſpect to manumiſſion; for *Kitàbat* is in one ſhape a cauſe of manumiſſion. In the caſe in queſtion, therefore, the contract of *Kitàbat* takes effect with reſpect only to the ſhare of the contracting partner, (according to *Haneefa*,) becauſe of its diviſibility,—the uſe of the other partner's aſſent being merely that by it his right of annulling the contract is relinquiſhed; (for if he were not to ſignify his aſſent, he might annul the contract.) Now the conſent of the other partner to the contracting partner's taking poſſeſſion of the ranſom, is a conſent to the ſlave's paying it. The aſſenting partner, therefore, acts voluntarily * with reſpect to his moiety in the ſlave's acquiſitions. Accordingly, the whole taken poſſeſſion of belongs to the contracting partner, and the aſſenting partner cannot afterwards deprive him of any part of it.

---

* Arab. *Teberrä*; literally, "*he does what he is not obliged to do*," (meaning, in this place, that he, for the preſent, ſurrenders his right.)—The tranſlator does not recollect any

Objection.—It is a rule that a perſon who acts voluntarily is entitled to reſume what he may have voluntarily relinquiſhed, where the end of his voluntary act has not been anſwered;—as if, for inſtance, a perſon were voluntarily to advance the price of merchandize, and the merchandize ſhould afterwards periſh before he had obtained poſſeſſion of it, or it ſhould prove the right of ſome other perſon; in which caſe the voluntary agent is entitled to take back what he had paid; and ſo likewiſe in the caſe in queſtion, as the end, namely *Kitâbat*, has been defeated, it would follow that the partner who voluntarily relinquiſhed his right is entitled to reſume what he had acted voluntarily with reſpect to.

Reply.—In the caſe in queſtion the maſter has undoubtedly proceeded voluntarily with reſpect to the *Mokâtib*, who, upon failing in his engagement, again becomes an abſolute ſlave; but a maſter cannot claim a debt from his ſlave; and hence it is that the voluntary agent cannot, in the preſent inſtance, reſume what he had relinquiſhed.

—According to the two diſciples, on the contrary, an aſſent to the *Kitâbat* of his partner's ſhare is, in fact, an aſſent to the *Kitâbat* of the whole ſlave, as they hold *Kitâbat* to be indiviſible. The contracting partner is therefore a principal with reſpect to one half, and an agent with reſpect to the other half: conſequently the ſlave is a *Mokâtib* to both; and as whatever, of his acquiſitions, may be received by the contracting partner, is equally participated between both, it

any *ſingle* Engliſh word which would convey the preciſe meaning, for which reaſon, and to avoid the obſcurity of a paraphraſtical tranſlation, he has, a little further on, rendered the participle from this root *voluntary agent*, a term which anſwers more exactly than any other to the idea of the author.

follows that it remains to be ſo participated after the ſlave has failed in the payment of his ranſom.

Caſe of a partnerſhip *Mokâtibâ*, bearing a child to her two maſters ſucceſſively.

If two men conſtitute their partnerſhip female ſlave a *Mokâtibâ*, and one of them afterwards cohabit with her, and ſhe bring forth a child, and the cohabiting partner claim it,—and the other partner afterwards cohabit with her, and ſhe bring forth another child, and this other partner claim that child, and the ſlave be afterwards unable to diſcharge her ranſom,—ſhe, in ſuch caſe, becomes an *Am-Walid* to the former partner. The reaſon of this is, that upon one of the two owners firſt claiming a child born of her, his claim was valid, becauſe of his right of property; and his ſhare became *Am-Walid* to him excluſively; for a *Mokâtibâ* is incapable of ſhifting from the property of one perſon to the property of another. Hence *his* ſhare alone became *Am-Walid**; (as in the caſe of a *Modabbirâ* held in partnerſhip between two; that is to ſay, if two perſons unite in granting a *Tadbeer* to their joint female ſlave, and one of them afterwards cohabit with her, and ſhe produce a child, and the cohabiting partner claim it,—in ſuch caſe the parentage of the child is eſtabliſhed in *this* partner, and *his* ſhare alone becomes *Am-Walid*;—and ſo likewiſe in the caſe in queſtion;)—and again, upon the other maſter claiming the ſecond child, his claim is alſo valid, as his right of property in the ſlave exiſts with regard to the appearance, becauſe of the endurance of the contract of *Kitâbat*. But upon the ſlave proving unable to diſcharge her ranſom, the contract of *Kitâbat* becomes the ſame as if it had never exiſted; and it then becomes evident that the ſlave is wholly an *Am-Walid*, becauſe the contract of *Kitâbat*, which was the obſtruction to her ſhifting from the property of one perſon to the property of another, is annulled. Conſequently, as the cohabitation of the former partner was prior in point of time, ſhe from that period becomes his *Am-Walid*;—and he is reſponſible to the other partner for half her value, as having become proprietor of that partner's ſhare, in virtue of the ſlave becoming wholly an *Am-Walid* to himſelf. In this caſe, alſo, an half *Akir* [fine of treſſpaſs] on account of the ſlave is incumbent on the *prior* cohabiting partner, becauſe of his having cohabited with a partnerſhip ſlave. The *latter* cohabiting partner, on the other hand, is reſponſible for an atonement to the amount of the *complete* fine; and he muſt alſo pay the other partner the value of the ſecond child, the parentage of which is eſtabliſhed in him; for he ſtands as a *Magroor*, as his right of property in the ſlave had an apparent exiſtence at the time of his connexion with her; and the parentage of a *Magroor*'s child is eſtabliſhed in the *Magroor*, and it is emancipated for the value, as has been repeatedly explained. As, however, it appears that this partner, in having ſuch connexion, has actually cohabited with the *Am-Walid* of another perſon, the *whole* fine is incumbent upon him, not an *half* fine. Either partner may, in this caſe, lawfully pay the fine to the *Mokâtibá*; becauſe as long as the contract of *Kitàbat* continues in force, the right of taking poſſeſſion of it appertains to her, as ſhe is ſole * with reſpect to the uſe of her perſon, or the conſideration for ſuch uſe. But upon her proving unable to fulfil her part of the contract of *Kitàbat*, ſhe muſt account to the prior cohabiting partner for what ſhe has thus received, as it then becomes evident that *he* is ſole with reſpect to the uſe of her perſon. All this is according to *Haneefa*. The two diſciples allege that the ſlave, upon claim being laid to the firſt child, becomes wholly an *Am-Walid* to the firſt partner, and that it is, conſequently, utterly unlawful for the other partner to have afterwards any connexion with her; becauſe all authorities agree that it is incumbent to make maternity † complete, as far as may be practicable; and this is practicable in the preſent inſtance, by diſſolving the contract of *Kitàbat*, as it is capable of annulment.—The contract of *Kitàbat* is therefore diſſolved ſo far as is not injurious to the *Mokâtibá*, ſuch as her becoming an *Am-Walid*, and continues in force with reſpect to other points, ſuch as her excluſive right to her earnings, and to the earnings of her child.—(It is otherwiſe with reſpect to a *Modabbirá*; for the analogy conceived by *Haneefa* between a contract of *Kitàbat* and the act of granting a ſlave *Tadbeer* is not admitted, as between thoſe there is an eſſential difference, *Kitàbat* being capable of diſſolution, whereas *Tadbeer* is not ſo. It is alſo otherwiſe with reſpect to the ſale of a *Mokâtib*, as the contract of *Kitàbat* cannot be diſſolved from the neceſſity of the ſale, ſince this would be injurious to the *Mokâtib*;—in other words, if the ſale were valid, the contract of *Kitabat* would be null, ſince the purchaſer will not aſſent to the continuance of the contract of *Kitàbat*; and in caſe the *Kitàbat* were annulled, it would be injurious to the *Mokâtib*; and a *Kitàbat* is not annulled with reſpect to any thing which would be injurious to the *Mokâtib*.)—It is alſo to be obſerved, that as the *Mokâtibá* became wholly *Am-Walid* to the firſt partner, it neceſſarily follows that the ſecond partner, in afterwards cohabiting with her, had connexion with the *Am-Walid* of another. Hence the parentage of the ſecond child is not eſtabliſhed in him, nor is it emancipated for the value. The ſecond partner, however, is not liable to puniſhment, becauſe of a demur; but he is liable to an *Akir*, or fine of treſpaſs, ſince, in conſequence of his commiſſion of the carnal act, either fine or puniſhment is unavoidably incurred, and as the latter is remitted, the former is conſequently due from him. With reſpect to the obligations to which the *Mokâtibá* is ſubject in this inſtance, there is a difference of opinion. Some ſay that a moiety of the ranſom is incumbent upon her; becauſe the contract was annulled only ſo far as might not be injurious to her, and in conſequence of remitting her half the ranſom ſhe ſuſtains no injury. Some, on the other hand, maintain that the *whole* ranſom is incumbent upon her; becauſe the contract in queſtion was not annulled except merely with reſpect to maſterſhip, in order that the firſt partner may become proprietor, and that ſhe may in conſequence become his *Am-Walid*; (that is to ſay, the contract is annulled purely from this neceſſity;) and hence the effect of annulment will not appear in regard to remitting a moiety of the ranſom. It is alſo to be obſerved, that the fine on account of the *Mokâtibá* is to be paid to her, as ſhe is excluſively entitled to the conſideration for the uſe of her perſon. If, however, ſhe afterwards prove incapable of paying her ranſom, and become again an abſolute property, ſhe muſt pay the ſaid fine to the firſt partner, as it then becomes evident that *he* is excluſively entitled to the conſideration for the uſe of her perſon. It is alſo to be obſerved, that in this caſe the firſt partner owes a compenſation to the other for half the value of the ſlave as a *Mokâtibá*, (judging from the opinion of *Aboo Yooſaf*;) ſince he [the firſt partner] has become proprietor of her at a time when ſhe has become a *Mokâtibá*. He therefore is thus reſponſible, whether he be rich or poor, as this is a *Zimân Timallook*, or *recompence for an aſſumption of property*, becauſe all the effects of right of property are obtained, with reſpect to the ſlave, ſuch as the legality of generation, right of ſervice, and ſo forth. According to the opinion of *Mohammed*, the firſt partner is reſponſible to the ſecond for whatever is the ſmalleſt of the two,—the half value of the *Mokâtibá*, or the half of what remains unpaid of the ranſom; becauſe his partner's right extends to the half of the ſlave's perſon, if ſhe be incapable of diſcharging her ranſom, or to the half of the ranſom if ſhe diſcharge it. As, therefore, his right embraces two objects, he is entitled to that one of them which is the ſmalleſt.

---

* That is to ſay, the property or quality of being an *Am-Walid* was reſtricted *excluſively* to his ſhare, and was not imparted in any reſpect to the ſhare of his co-partner. (This is the literal ſenſe of the paſſage as it occurs in the *Arabic* verſion.)

---

* Meaning, "*ſhe has excluſive privilege with reſpect to the diſpoſal of.*"

† Arab. *Amoomecat*, from *Am*, [mother.]—*Am-Walid* literally means *mother of a child*. Conſequently *Amoomeeat al Walid* ſignifies *the ſtate of being mother to a child.*

Caſe of a partnerſhip *Mokâtibá* bearing a child to one maſter, and created a *Modabbirá* by the other.

IN the caſe above ſtated, if the ſecond partner ſhould not have connexion with the *Mokâtibá*, but create his ſhare of her *Modabbirá*, and ſhe be afterwards unable to pay her ranſom, the *Tadbeer* he has thus granted to her is null, as it now appears that he has not conſtituted *his own* property *Modabbirá*, but the property of the firſt partner.— This, according to the two diſciples, is evident; becauſe (as they

maintain)

maintain) the firſt partner became proprietor of her *in toto*, in conſequence of making her an *Am-Walid*, before her incapacity to pay the ranſom appeared. It is alſo evident, according to *Haneefa*, becauſe (as he maintains) in conſequence of her incapacity to pay her ranſom, it appears that the firſt partner has become proprietor of the ſecond partner's ſhare from the period of cohabitation, and it thence appears that he [the ſecond partner] created *Modabbirá* what was not his own property; and the validity of *Tadbeer* reſts upon right of property:—contrary to the *eſtabliſhment of parentage*, the validity of that reſting upon *affinity*, as has been explained in its proper place. It is alſo to be obſerved, that the ſlave in queſtion, in caſe of the ſecond partner not having connexion with her, but creating his ſhare of her a *Modabbirá*, is an *Am-Walid* to the firſt partner, as he has become proprietor of the other partner's ſhare; and ſhe is completely and entirely ſo, becauſe of what was already ſaid, that "all authorities agree that "it is incumbent to make maternity complete." The firſt partner is reſponſible to the ſecond for a moiety of the *Akir*, or fine of treſpaſs, as having had connexion with a partnerſhip ſlave; and he is alſo reſponſible for half her value, as having become proprietor of his half, in virtue of *Iſteelâd*, which requires that he become proprietor for the value. The child born of the ſlave, moreover, appertains to the firſt partner, as his claim to it is valid, the occaſion of ſuch validity (namely, right of property) exiſting in the ſlave. This is the opinion of all our doctors, on the grounds which have been before explained.

Caſe of a partnerſhip *Mokâtibá* emancipated by one of her maſters.

If two maſters create their partnerſhip ſlave a *Mokâtibá*, and one of them, being wealthy, afterwards emancipate her, and ſhe, after that, prove unable to pay her ranſom, in this caſe the emancipator is reſponſible for half her value, for which ſhe then becomes reſponſible to him *. This is according to *Haneefa*. The two diſciples maintain that ſhe is not reſponſible to him for ſuch half, becauſe, in conſequence of her incapacity to pay her ranſom, ſhe again becomes an abſolute ſlave, and is the ſame, in fact, as if ſhe had never been any thing elſe.—In the inſtance, alſo, of one of two partners emancipating his ſhare of a partnerſhip ſlave, there is a difference of opinion concerning the recovery of the compenſation;—for, according to *Haneefa*, the non-emancipating partner has in this caſe three things at his option;—he may either emancipate his ſhare, or require emancipatory labour on account of it from the ſlave, or take a compenſation for the value of it from his partner;—whereas, according to the two diſciples, he muſt take a compenſation from his partner for the value, if he be rich, or if he be poor he muſt require emancipatory labour from the ſlave.—There is alſo, in this inſtance, a difference with reſpect to the *Willa*, or right of inheriting to the ſlave; for this, according to *Haneefa*, belongs to both partners, in proportion to their reſpective ſhares, provided the other partner alſo emancipate his ſhare, or require emancipatory labour,—or, it belongs excluſively to the emancipating partner, if the *non*-emancipator take from him a compenſation for the value of his ſhare;—whereas, according to the two diſciples, the *Willa* belongs to the emancipator, excluſively, at all events. The difference of opinion upon theſe three points is occaſioned by the difference between our doctors concerning the diviſibility of manumiſſion, as already ſet forth under its proper head.—What is above advanced proceeds on the ſuppoſition of the ſlave being unable to pay her ranſom; for before her incapacity becomes apparent, the non-emancipating partner cannot take a compenſation from the emancipator, according to *Haneefa*, becauſe as (agreeably to his tenets) manumiſſion is diviſible, the effect of his emancipation of a part is merely to render the ſhare of the non-emancipator like a *Mokâtib*; and as the ſlave is already a *Mokâtibâ*, it follows that no change is wrought in that ſhare by ſuch manumiſſion. According to the two diſciples, on the contrary, as manumiſſion (agreeably to their tenets) is indiviſible, the whole ſlave becomes free, whence the non-emancipating partner is entitled to take a compenſation from the emancipator for the value of his ſhare, provided he be rich,—or, if he be poor, to require emancipatory labour from the ſlave;—for as this is a caſe of *recompence for manumiſſion*, the wealth or poverty of the emancipator occaſions a difference.

---

* That is to ſay, which ſhe is accountable for to him, and muſt diſcharge by emancipatory labour, before ſhe can obtain complete liberty.

Caſe of one of two maſters creating his ſhare in a ſlave *Modabbir*, and the other then emancipating his ſhare.

If one of two maſters conſtitute his ſhare in a ſlave *Modabbir*, and the other maſter, being wealthy, afterwards emancipate his ſhare, in this caſe the former has it at his option either to take a compenſation from the emancipator for half the value of the ſlave, as a *Modabbir*, or to require emancipatory labour from the ſlave, or, laſtly, to emancipate him gratis. If, on the contrary, one partner firſt emancipate his ſhare, and the other then conſtitute his ſhare *Modabbir*, this partner cannot take any compenſation from the emancipator,—but he may either require emancipatory labour from the ſlave, or may emancipate him gratis *. With reſpect to the *Modabbir* value of the ſlave, ſome ſay that it is to be eſtabliſhed by appraizers.—Others, again, contend that it is two thirds of the value as an abſolute ſlave; and this is approved; becauſe the advantages derived from a ſlave are of three kinds or deſcriptions,—firſt, *ſale*, and the like,—ſecondly, *ſervice*, and the like,—and thirdly, *manumiſſion*, and the like;—and as one of theſe is done away by *Tadbeer*, (namely, *ſale* and the like,) it follows that one third of the value drops.—It is proper to remark, that upon the emancipator paying the *Tadbeer* partner a compenſation, ſtill he does not, in conſequence, become proprietor of that portion of the ſlave for which he pays ſuch compenſation; for a *Modabbir* cannot ſhift from the property of one perſon to the property of another;—as where, for inſtance, a perſon uſurps the *Modabbir* of another, and he [the *Modabbir*] abſconds, and the uſurper pays the owner a compenſation; in which caſe he does not become proprietor of the *Modabbir*, but upon his being taken and brought back, is only at liberty to require emancipatory labour from him.—If one of the two maſters firſt emancipate the ſlave in queſtion, the other has three things at his option, according to *Haneefa:* and if he create his ſhare a *Moddabir*, his option of taking compenſation diſcontinues, but he has ſtill an option of emancipating the ſlave, or requiring emancipatory labour from him, as a *Modabbir* is capable of either being emancipated or having emancipatory labour required from him.—*Aboo Yooſaf* and *Mohammed* have ſaid that if one of the two maſters firſt conſtitute his ſhare in the ſlave *Mokâtib*, the emancipation by the other partner would be null; becauſe as (according to them) *Tadbeer* is indiviſible, the partner who grants it thereby becomes proprietor of the other partner's ſhare, and muſt make a compenſation to him for half the value, whether he be rich or poor, as this is a *Zimân Timâllook*, or *recompence for aſſumption of property*, the obligation of which is not affected by the wealth or poverty of him who is reſponſible for it.—He muſt, moreover, make this compenſation for half the value at the rate of an *abſolute* ſlave, as the ſlave whom he has conſtituted *Modabbir* is an *abſolute* ſlave.—If, on the contrary, one of the two partners firſt emancipate his ſhare, *Tadbeer* by the other partner would be null; becauſe (according to them) manumiſſion is indiviſible; whence the ſlave is emancipated *in toto*, and therefore the point upon which the validity of *Tadbeer* reſts does not here exiſt.—And in this caſe the emancipator is reſponſible for half the value of the ſlave, provided he be wealthy; or, if he be poor, the ſlave muſt perform emancipatory labour for half his value,—becauſe this is a *Zimân Ittâk*, or *recompence for manumiſſion*, the nature of which is different, according to the emancipator's circumſtances.

---

* A ſmall portion of the text, explaining the principles upon which *Haneefa* proceeds in this inſtance, is here omitted, as it is exceedingly trifling, and ſomewhat obſcure, and the ſubſtance of it has already been explained in treating of the manumiſſion of partnerſhip ſlaves.

CHAP. VI.

Of the Death or Inſolvency* of the *Mokâtib*; and of the Death of his Maſter.

A *Mokâtib* failing in his payments, muſt (if he appear on enquiry to be ſolvent) be indulged with a ſhort delay:

Upon a *Mokâtib* failing to make good the ſtated payments ſtipulated†, the magiſtrate muſt examine into his circumſtances; and in caſe he find that there are recoverable debts owing to the *Mokâtib*, or that he has property in another perſon's hands, which is likely to be reſtored, he muſt not precipitate his decree of inability, but muſt wait for two or three days, out of tenderneſs to both parties,—to the maſter, in order that he may get the ranſom, and to the ſlave, in order that he may obtain his liberty.—The time of waiting is fixed at three days, becauſe this is the time granted for making experiment of the truth of pretexts,—as in the delay allowed to a defendant, for the purpoſe of accommodation,—or to a debtor, for the purpoſe of paying his debts:—hence the time of waiting muſt not exceed that term.—If, on the contrary, the *Mokâtib* have nothing whatever, and the maſter require the magiſtrate to paſs a decree of inability, he muſt accordingly paſs ſuch decree forthwith, and diſſolve the contract of *Kitàbat*.—This is according to *Haneefa* and *Mohammed*.—*Aboo Yooſaf* maintains that the magiſtrate muſt not paſs a decree until ſuch time as the *Mokâtib* ſhall have failed in two payments ſucceſſively, becauſe of a ſaying of *Alee*, "*Upon the* MOKÂTIB *falling in arrear two payments,* "*ſucceſſively, let him revert to his original ſtate of an abſolute ſlave,*"

---

* Meaning, "his inability to complete the payment of his ranſom."

† The ranſom or conſideration for *Kitàbat* is generally ſtipulated to be paid by the ſlave in ſeparate *Kiſts*, or *lots*, at appointed times, which are here termed by the tranſlator, the *payments*.

Digitized by Google

as from hence it may be inferred that he does not revert to a ſtate of abſolute bondage as long as he does not fail in two payments; ſince, as the prophet's ſucceſſor here ſuſpends his ſo doing upon that circumſtance, it cannot happen until that circumſtance takes place. Beſides, a contract of *Kitàbat* is a contract of friendſhip and benevolence, whence it is moſt laudable that a prompt performance be not inſiſted on in it.—The time for payment, moreover, is *after* the arrival of the period appointed;—(in other words, upon the term of credit expiring, payment becomes due; but the contract is not diſſolved until after the lapſe of ſuch a time as may afford an opportunity to provide money for the payment;)—and it is therefore indiſpenſably requiſite that, after the expiration of the term of credit, a delay be granted of ſuch a time as may ſerve for experiment, and enable the ſlave to make payment;—and the moſt approved time of ſuch delay is the time agreed upon by the contracting parties, namely, the term of the ſecond payment. As ſoon, therefore, as the term of credit of the ſecond payment is expired, if the ſlave have not paid, his inability to pay becomes eſtabliſhed, becauſe of the lapſe of the term of delay agreed upon by the contracting parties.—The argument of *Haneefa* and *Mohammed* is that the cauſe of annulment, namely, inability to pay, is already fully eſtabliſhed, ſince a perſon who is incapable of making good *one* payment is certainly incapable of making good *two*.—Beſides, the deſign of the maſter is to obtain poſſeſſion of the property at the expiration of the term of credit; and as this deſign is not anſwered, it follows that the contract of *Kitàbat* is diſſolved, unleſs he aſſent to a farther delay. This reaſoning, however, does not hold with reſpect to a forbearance for two or three days, as that is indiſpenſably requiſite to enable the *Mokâtib* to make good his payment: this, therefore, is not accounted a delay. With reſpect to the dependance placed by *Aboo Yooſaf* upon the ſaying of *Alee*, it may be replied that traditions differ upon the point in queſtion; for it is related that *Omar*, upon his *Mokâtibâ* proving unable to make good one payment of her ranſom, remanded her to her original ſtate of abſolute bondage;—and where caſes in point thus eſſentially differ, no poſitive inference can be drawn from them.

but the *Kitàbat* may be diſſolved by his conſent *without* ſuch delay;

If there be a failure of payment ſubmitted to the deciſion of ſome other than the *Kâzee*, or other public magiſtrate, and the *Mokâtib* ſlave prove unable to make good his engagement, and his maſter accordingly reduce him again to the ſtate of an abſolute ſlave, with his [the ſlave's] conſent, it is lawful, becauſe as the contract of *Kitàbat* might be diſſolved by his conſent, without any pretext, it may conſequently be ſo diſſolved where a pretext actually exiſts *a fortiori.*—If, however, the ſlave be not aſſenting, a decree of the *Kâzee* is indiſpenſably requiſite to annul the contract of *Kitàbat*; becauſe as it is complete and binding, a decree of the *Kâzee*, or the aſſent of the parties, is therefore requiſite to its diſſolution;—in the ſame manner as holds with reſpect to a reſtitution of merchandize, after ſeizin, in conſequence of a defect.

and upon the *Kitàbat* being diſſolved, the bondage completely reverts.

Upon a *Mokâtib* becoming incapable of paying his ranſom, all the effects of bondage revert, in conſequence of the diſſolution of the contract of *Kitàbat.*—In this caſe, alſo, all the earnings of the *Mokâtib*, then in his poſſeſſion, belong to his maſter, as they then appear to be the acquiſitions of his ſlave. The ground of this is, that the right of property in thoſe acquiſitions was ſuſpended; for if the *Mokâtib* had duly paid his ranſom they would have belonged to him, whereas failing this, they belong to his maſter;—and upon the inability becoming evident, the ſuſpence diſcontinues, and the earnings belong to the maſter accordingly.

Decree to be iſſued on the death of an inſolvent *Mokâtib.*

If a *Mokâtib* die, leaving effects ſufficient to diſcharge his ranſom, the contract of *Kitàbat* is not diſſolved; but a decree is paſſed, directing that " every thing owing by the *Mokâtib* ſhall be paid out of his " eſtate,—(that) he is free upon the laſt inſtant of his life,—and " (that, conſequently) what remains, after paying the ranſom, ſhall "go to his heirs, and his children are free."—This is the doctrine of *Alee* and *Ibn Maſaood*; and our doctors have always acted in conformity with it.—*Shafeï* maintains that the contract of *Kitàbat* becomes null, and the *Mokátib* dies an abſolute ſlave. The effects, alſo, left by him belong to his maſter; becauſe *Zeyd Binſàbit* has ſaid, "a contract of "*Kitàbat* is annulled by the deceaſe of the *Mokâtib*;" and alſo, becauſe the deſign of a contract of *Kitàbat* is the emancipation of the *Mokâtib*, and as the accompliſhment of this end has become impracticable, the contract is conſequently null. The ground of this is that, even admitting freedom to be eſtabliſhed, ſtill it is not exempt from one of three conſtructions; for it is either eſtabliſhed *after* death, as happening in conſequence of that event,—or *before* death,—or, laſtly, *after* death, in the manner of a ſucceſſion. Now on all theſe ſuppoſitions it is a mere nullity:—in the firſt, becauſe, in conſequence of having died, he no longer remains capable of being emancipated;—and, in the ſecond, becauſe the condition of his freedom (namely, the payment of a ranſom) has not taken place;—and, in the third, becauſe a thing is firſt eſtabliſhed and then ſucceeded to,—but here the eſtabliſhment of the *Mokâtib*'s freedom *a priori* is impoſſible. The argument of our doctors is, that a contract of *Kitàbat* is a contract of exchange; and as it therefore would not be rendered null by the deceaſe of *one* of the contracting parties, namely the maſter, ſince the continuance of ſuch a contract is both convenient and requiſite, for the ſake of giving life to the maſter's right,—it follows, in the ſame manner, that it is not annulled by the deceaſe of the other contracting party, namely the *Mokâtib*, ſince the continuance of the contract is requiſite for giving life to his right *a fortiori*, his right being of a ſtill more forcible nature than the right of his maſter, inſomuch that the contract is binding on the part of the maſter, as he cannot of himſelf annul it on account of the right of the ſlave,—whereas it is not binding on the part of the ſlave, as he has it in his power to annul it of himſelf.—It is to be obſerved, that ſome of the learned hold the ſlave to become free after death, in this way, that he is ſtill ſuppoſed virtually to live in his contract. Moſt lawyers, however, maintain that he is free upon the laſt inſtant of his life, in the manner of a ſucceſſion, and in this way, that the cauſe of his freedom, namely the diſcharge of his ranſom, is referred to a time antecedent to his death; and that therefore the payment of the ranſom by the heir of the *Mokâtib* (namely his ſucceſſor) is equivalent to payment by himſelf;—and all this is poſſible; as is explained at large in the *Khilâſeeyât* *.

A *Mokâtib* dying inſolvent, and leaving a child born in *Kitàbat*, the child muſt perform labour to the value of his ranſom.

If a *Mokâtib* die without leaving property ſufficient to diſcharge his ranſom, but leave a child, who was born during the exiſtence of the contract, this child is to perform emancipatory labour for the diſcharge of its father's ranſom, to a degree equivalent to the payments ſtipulated by the father,—and upon the child ſo doing, a decree muſt be paſſed, declaring the father to have been free before death; and the child himſelf becomes free, as having been included in the father's contract of *Kitàbat*;—for as, in this inſtance, the earnings of the child are the ſame as the earnings of the *Mokâtib*, it follows that payment made by the child is equivalent to payment by the father; and the caſe is conſequently the ſame as if the *Mokâtib* had left behind him property ſufficient for the diſcharge of his ranſom.

If the *Mokâtib* had *purchaſed* his child, the child muſt diſcharge the ranſom, or become a ſlave.

If a *Mokâtib* die, without leaving property ſufficient to diſcharge his ranſom, but leave his child, whom he had purchaſed † during the exiſtence of the contract, this child is to be informed that "he muſt "either *now* pay the father's ranſom, or himſelf become an abſolute "ſlave."—This is according to *Haneefa*.—According to the two diſciples, the child is to diſcharge the ranſom agreeably to the payments and times of payment ſtipulated by the father; becauſe ſuch is the rule with reſpect to a child *born* during the exiſtence of the contract, on account of that child being a *Mokâtib* in dependance from the father, and the ſame reaſon holds with reſpect to a child *purchaſed* during the exiſtence of the contract,—whence it is that the maſter is at liberty to *emancipate* ſuch child (in oppoſition to any *other* acquiſitions of the *Mokâtib*, as over theſe the maſter has no power:)—the *purchaſed* child, therefore, is ſubject to the ſame rule, in this particular, with the child born during the exiſtence of the contract. The argument of *Haneefa* upon this point is that there is a material difference between the caſes;—becauſe, as the different payments and times of payment are eſtabliſhed by the ſtipulations in the contract, they are eſtabliſhed with reſpect only to any perſon included in it; but the *purchaſed* child is not included in the contract, as to him it has no reference:—the terms of the contract, therefore, do not extend to or reach him, becauſe of hi being diſtinct. It is otherwiſe with reſpect to a child *born* during the contract, as he was conjunct at the time of the exiſtence of *Kitâbat*, and conſequently the terms of the contract extend to him;—and as he is thus included in the terms of it, he therefore muſt perform emancipatory labour agreeably to the payment ſtipulated in it.

---

* An *Arabic* law-treatiſe ſo termed.

† This ſuppoſes his child to have been a ſlave to ſome other perſon, (not the maſter of the *Mokâtib*,) and that the *Mokâtib* has purchaſed him from that perſon with a view to his future freedom, which muſt take place upon the *Mokâtib* himſelf becoming free.

If he die ſolvent, the child is free and his heir.

IF a *Mokâtib* purchaſe his child, and then die, leaving property ſufficient to diſcharge his ranſom, the child is his heir;—becauſe, upon a decree being iſſued, declaring the *Mokâtib* to be free on the laſt inſtant of his exiſtence, a decree muſt alſo iſſue, declaring the child likewiſe to be free at that time, as being a dependant of the father with reſpect to *Kitâbat*.—The child therefore is free, and the heir of a freeman.—In the ſame manner alſo, the child is free in a caſe where father and child have both become *Mokâtibs* under one contract, and the father dies, leaving property ſufficient to diſcharge the ranſom;—becauſe the child, if an infant, is a dependant of the father,—or if an adult, they are both regarded as one perſon, becauſe of the unity of the contract. Upon a decree, therefore, being iſſued, declaring the freedom of the father, a decree is alſo iſſued, declaring the freedom of the child at the ſame time.

Caſe of a murder committed by the child of a deceaſed *Mokâtib* begot upon a freedwoman.

If a *Mokâtib* die, leaving a child, born to him of a freed-woman, together with debts owing to him by different perſons ſufficient to diſcharge his ranſom, and the child afterwards commit a murder, and a fine of blood be decreed againſt the *Akilás* of the mother, this does not amount to a decree of inſolvency againſt the *Mokâtib*; becauſe in conſequence of ſuch decree the effect of the *Kitàbat* is rather confirmed and eſtabliſhed; (for the contract requires that the child of the *Mokâtib* be annexed to the *Mawlas*, or patrons of the mother, and that the fine be levied upon them, ſince they are her tribe [*],—in this way, however, that there was a poſſibility that the father might have become free, and might conſequently have drawn over the *Willa* right with reſpect to the child to his own patrons;)—and the *Kázee* decreeing any thing which tends to eſtabliſh and confirm the effect of the *Kitàbat*, does not amount to a decree of inſolvency againſt the *Mokâtib*. If, on the contrary, the *Mawlas* of the mother litigate the right of *Willa* in regard to the child with the *Mawlas* of the father, and the *Kázee* decree in favour of the mother's *Mawlas*, this is an adjudication of the *Mokâtib*'s inſolvency; becauſe in this inſtance the difference between the *Mawlas* is not merely incidental, but is brought forward on its own grounds, and reſts upon the endurance or diſſolution of the contract of *Kitàbat*; for if the contract be diſſolved, the *Mokâtib* dies a ſlave, and the *Willa* of the child goes of courſe to the *Mawlas* of the mother; and if, on the other hand, the contract continue in force, and the payment of the ranſom be connected with it, the *Mokâtib* dies a freedman, and the *Willa* of the child ſhifts to the *Mawlas* of the father.—Now, concerning the *Mokâtib*'s being free or otherwiſe, there is a difference of opinion among the companions.—Hence whatever the *Kâzee* may decree takes effect; and accordingly, in this laſt inſtance, his decree is a decree of inſolvency.

---

[*] "They are her *Akilás*."—(See *Moàkil.*) This caſe cannot be fully comprehended without a reference to the laws of *Deyit*, *Moàkil*, and *Willa*.

An alms received by a *Mokâtib*, and made over to his maſter, is lawful to the latter in caſe of the *Mokâtib's* inſolvency.

IF a perſon beſtow any thing upon a *Mokâtib* by way of alms[*], and he give the ſame to his wealthy maſter as part of his ranſom, and be afterwards incapable of completely diſcharging the ranſom, that thing is perfectly lawful to the maſter; becauſe the right of property in it has undergone an alteration, as the ſlave had become proprietor of it as an alms, and the maſter has become ſo as a conſideration for manumiſſion;—which is manifeſted by the words of the prophet, ſpeaking of *Bareerá*, "*This is an* ALMS *to him, but to me it is a* GIFT-OFFERING."—It is different where a *Mokâtib* gives his rich maſter, or a *Hâſhimee*, liberty to uſe or diſpoſe of *victuals*[†] which have come to him as an alms; for they cannot lawfully eat thoſe victuals, becauſe as they are the property of the perſon who gave a liberty with reſpect to them, it follows that theſe perſons, in eating them, would eat the property of another, as the right of property in the victuals has not undergone any alteration.—Correſpondent to this is a caſe where a perſon purchaſes an article by an invalid purchaſe, and then gives another a liberty with reſpect to it,—for ſtill the article is not lawful to this other,—whereas if he were to make a formal *conveyance* of the article to him, it would be lawful.—What is here advanced proceeds on a ſuppoſition of the *Mokâtib* proving unable to pay his ranſom, after having given his maſter the article in queſtion as a part of it.—If, on the contrary, he be inſolvent *before* he have ſo given it, in this caſe alſo the ſame rule obtains, (according to the *Rawâyet Saheeh*;)—in other words, the article is lawful to the maſter.—This, according to *Mohammed*, is evident, becauſe (agreeably to his tenets) by the inſolvency of the *Mokâtib* an alteration is wrought in the right of property, ſince upon this appearing, the maſter becomes proprietor of his acquiſitions, by a new right:—and it is alſo evident, according to *Aboo Yooſaf*, notwithſtanding the maſter's right of property be eſtabliſhed by the *Mokâtib*'s inſolvency;—the reaſon, however, according to him, is that the baſeneſs does not exiſt in the *alms*, but in the act of the *taker*, who incurs a degradation, which it is not lawful for a wealthy perſon to ſubject himſelf to without neceſſity,—nor for a *Hàſhimee*, becauſe of his ſuperior rank:—now the maſter is not found in the act of *taking*, and he therefore reſembles a pilgrim or traveller who arrives at his own country, or a pauper who becomes wealthy,—and in whoſe hands there ſtill remains a part of the alms they had received; for ſuch remaining part is lawful to them; and, on the ſame principle, if a *Mokâtib* become free, and acquire wealth, ſtill any thing remaining to him of the alms he may have received is lawful to him.

---

[*] It is common to beſtow alms upon ſlaves, with a view to enable them to purchaſe their freedom; and a portion of the *Zakât*, or public alms levied by government, is allotted to them for this purpoſe. (See Vol. I. p. 53.)

[†] Literally, "renders *free* [*Mobah*] to his rich maſter, or a *Hâſhimee*, victuals, &c." The point upon which the reaſoning here turns is the diſtinction between merely giving a perſon permiſſion to do as he likes with an article, and making it over to him by a formal conveyance and inveſtiture.

Caſe of an offence committed by a ſlave, who is afterwards made *Mokâtib* by his maſter.

If a ſlave commit an offence, and his maſter, not being informed of this, create him a *Mokâtib*, and he [the *Mokâtib*] prove inſolvent, the maſter muſt in this caſe either part with him, in recompence for the offence, or pay an atonement for it; ſuch being the original rule in offences committed by ſlaves. The maſter, moreover, was not aware of his offence during the exiſtence of *Kitàbat*, ſo as to embrace the option of paying the atonement; and at any rate, the *Kitàbat* would at that ſeaſon have deprived him of the alternative, as it would have prevented him from parting with the offender: but upon the *Kitàbat* failing the original rule reverts. In the ſame manner alſo, if a *Mokâtib* commit an offence, and the *Kâzee* neglect to decree a fine for the offence until ſuch time as he [the *Mokatib*] proves inſolvent, the maſter muſt in that caſe either part with him, or pay an atonement;

ment; for upon the *Kitàbat*, which was the obſtacle to parting with him, failing, the original rule reverts, as above mentioned.—If, on the other hand, the *Kâzee* had decreed a fine for the offence whilſt the ſlave was a *Mokâtib*, and he [the ſlave] afterwards prove inſolvent, it [the fine] is in that caſe a debt upon him, for the diſcharge of which he muſt be ſold; becauſe the right of the avenger of the offence in queſtion to the ſlave's perſon ſhifts to his value, in conſequence of the *Kâzee*'s decree. This is the doctrine of *Haneefa* and *Mohammed*; and *Aboo Yooſaf* alſo laterally adopted it. He [*Aboo Yooſaf*] had before held it a maxim that the ſlave ſhould be ſold on account of the fine, notwithſtanding he were to prove inſolvent antecedent to the *Kâzee*'s decree; (and ſuch is the opinion of *Ziffer*;) becauſe, as the obſtacle to the maſter parting with him (namely, *Kitàbat*) is eſtabliſhed and extant at the time of offence, it follows that upon the occurrence of the offence at that time, the value of the ſlave becomes due;—in the ſame manner as holds with reſpect to a *Modabbir* or *Am-Walid*; that is to ſay, if a *Modabbir* or *Am-Walid* commit an offence, their value is due, ſo likewiſe in the preſent inſtance. The argument of *Haneefa* and *Mohammed* is, that the obſtacle is capable of failure, ſince it is poſſible that the *Mokâtib* may prove inſolvent, and conſequently become again an abſolute ſlave. As, moreover, the right of the avenger of offence does not ſhift to his value on the inſtant, it therefore remains ſuſpended upon a decree of the *Kâzee*;—in the ſame manner as where a purchaſed ſlave abſconds before the purchaſer has taken poſſeſſion of him; in which caſe the diſſolution of the ſale depends upon a decree of the *Kâzee*, as it is ſtill poſſible that the ſlave may return.—It is otherwiſe with reſpect to a *Modabbir* or *Am-Walid*, as *Iſteelâd* is incapable of failure or diſſolution, under any circumſtance whatever.

A contract of *Kitàbat* is not diſſolved by the death of the maſter.

IF the maſter of a *Mokâtib* die, the contract of *Kitàbat* is not diſſolved, in order that the right of the *Mokâtib* may not be annulled; for *Kitàbat* operates as a cauſe of freedom, and freedom is the right of the *Mokâtib*;—and as, whatever is the right of a perſon, the cauſe thereof is alſo his right, it follows that the *Kitàbat* is the right of the *Mokâtib*.—Now a right is not annulled by death, in the ſame manner as a debt owing from any perſon is not annulled by the death of that perſon.—The contract of *Kitàbat*, therefore, is not diſſolved: but the *Mokâtib* muſt be told to account for his ranſom to the heirs of the deceaſed, agreeably to the payments engaged for in the contract; becauſe, as that is the mode in which he is entitled to freedom, and as the cauſe of his freedom has alſo been thus preſcribed, it conſequently continues ſo without any alteration.—It is to be obſerved, however, that the maſter's heirs are his ſubſtitutes with reſpect only to receiving or exacting payment of the ranſom.—If, therefore, one of them emancipate his ſhare in the *Mokâtib* gratis, ſtill his manumiſſion does not take effect, as he has not become a *proprietor* of that ſhare, a *Mokâtib* not being a ſubject of inheritance.—The ground of this is that as a *Mokâtib* cannot become a property in virtue of any *other* cauſes of right of property, (ſuch as *ſale*, *gift*, and ſo forth,) ſo neither can he in virtue of inheritance. If, however, all the heirs unite in emancipating the *Mokâtib*, he is free; becauſe his ranſom is in this caſe remitted; for the manumiſſion exempts him from it, as it is the right of the heirs, and ranſom is a ſubject of inheritance;—and upon the ranſom being remitted, he becomes free of courſe,—in the ſame manner as where a maſter exempts his *Mokâtib* from ranſom. —Where, on the contrary, emancipation is granted by only *one* of the heirs, an exemption from his ſhare [of ranſom] is not eſtabliſhed; becauſe the manumiſſion above deſcribed is rendered an exemption, in the manner of an eſſential requiſite, or thing taken for granted, in order that the freedom of the *Mokâtib* may be valid and effectual. Now manumiſſion is not eſtabliſhed by a partial exemption, or a partial payment, with reſpect either to the *whole* or to a *part* of the *Mokâtib*; and conſequently the exemption cannot be eſtabliſhed; becauſe where *that which requires* (namely, manumiſſion) does not appear, *that which is required* (namely, exemption) cannot be eſtabliſhed;—and if, on the other hand, the *Mokâtib* were exempted from the *whole* of the ranſom, in conſequence of emancipation by a part of the heirs, it would be abſurd, becauſe the right of the other heirs is connected with it.

HEDAYA.

BOOK XXXIII.

Of WILLA[*].

Definition of the term.

WILLA literally means aſſiſtance and friendſhip. In the language of the LAW it ſignifies (according to the expoſition in the *Indyat*) that mutual aſſiſtance which is a cauſe of inheritance.

Willa is of two deſcriptions, *Ittakit*

WILLA is of two ſpecies or deſcriptions. I. *Willa Ittàkit*[†], (which is alſo termed *Willa Niàmit*[‡],) the occaſion of which is manumiſſion, and *Mawalât.*

---

[*] There is no ſingle word in our language fully expreſſive of this term. The ſhorteſt definition of it is "*the relation between the maſter* (or patron) *and his freedman*;" but even this does not expreſs the whole meaning.

[†] The *Willa* of *manumiſſion*.

[‡] The *Willa* of *beneficence*, or of *favour*.

miſſion from right of property, (according to the *Rawâyet-Saheeh*,) whence it is that if a perſon become proprietor of his kinſman by inheritance, ſuch kinſman is free, and his *Willa* goes to that perſon.—II. *Willa Mawalât* [*], the occaſion of which is a contract of *Mawalât*, [*mutual* amity—or patronage and clientage,] as ſhall be explained in its proper place.—The occaſion of the firſt ſpecies, therefore, being manumiſſion, and of the ſecond, a contract of mutual amity, they are termed the WILLA *of manumiſſion*, or the WILLA *of mutual amity*, by a reference of the effect to the cauſe. Both ſpecies, moreover, bear the characteriſtic of *aſſiſtance:*—and as the *Arabs* were accuſtomed to aſſiſt each other in various ways, and the prophet interpreted ſuch mutual aſſiſtance into *Willa* of both ſpecies, he uſed to ſay of them, indiſcriminately, "*They have* WILLA *people among them,*" and alſo, "*They have* HALEEFS [ſworn confederates] *among them;*" by which laſt is underſtood the relation of *Mâwla Mawalât*, as the *Arabs* were accuſtomed to confirm their contracts of *Mawalât*, or mutual amity, by oaths.

The *Willa* of a ſlave appertains to his emancipator, rendering him liable to fines incurred by the ſlave,

IF a maſter emancipate his ſlave, the *Willa* of ſuch ſlave appertains to him;—becauſe the prophet has ſaid, "*The* WILLA *of a ſlave belongs to the perſon who emancipates him;*" and alſo, becauſe [†] [two conſequences ariſe from manumiſſion; I. Liability to the *Deyit*, or fine of blood,—the cauſe of which liability is *aſſiſtance*, exhibited and ob-

---

[*] The *Willa* of *mutual amity*, or of *confederacy*.

[†] The paſſage between the crochets is in ſome places rather obſcure; and affords an inſtance of the great liberty occaſionally taken by the *Molovees* employed in the compoſition of the *Perſian Hedâya*, for which indeed they have endeavoured to apologize, by alledging the exceſſive cloſeneſs and obſcurity of the original text. [See *introductory addreſs*.] The whole paſſage, in the *Arabic*, ſtands *verbatim* thus,—"becauſe he aſſiſts him thereby, and conſequently attaches him; and he likewiſe, in effect, gives life to him by the deſtruction of his bondage, whence he inherits of him; and his *Willa*, with reſpect to him, reſembles relationſhip; and alſo, becauſe [there muſt be] an acquiſition for a ſurrender." What is mentioned of "the liability to the *fine of blood* being induced by manumiſſion" is becauſe an emancipator is the *Akilâ* of his freedman. (See *Moâkil*.)

tained

Digitized by Google

and endowing him with a right of inheritance.

tained by means of manumiſſion; and, II. Inheritance,—becauſe the emancipator has given life to the emancipated by means of removing his bondage, and conſequently inherits of him. The relationſhip of *Willa*, moreover, reſembles relationſhip of blood, with reſpect to inheritance, and the obligation of atonement by fine, the prophet having ſaid, "*The relationſhip of* WILLA *is like the relationſhip of con-*" *ſanguinity.*"

OBJECTION.—From this it would follow that the emancipated alſo inherits of his emancipator, where he is deſtitute of kindred; (and ſuch is the opinion of *Hàſan Bin Zeeyàd*;) whereas it is otherwiſe.

REPLY.—An emancipated ſlave is a ſtranger with regard to his emancipator, and conſequently does not inherit of him. The emancipator's right, moreover, to inherit of the emancipated, is founded on a particular text of the KORAN, in oppoſition to analogy, which, therefore, muſt not be abandoned or departed from with reſpect to any other inſtance of inheritance.

—Another reaſon, alſo, why the *Willa* of an emancipated ſlave appertains to his emancipator is, that there muſt be an acquiſition for a ſurrender,—or, in other words, an advantage in lieu of a loſs; and as, in conſequence of emancipation, the property involved in the ſlave is deſtroyed, the *Willa* thereof conſequently belongs to his emancipator.] It is to be obſerved that a woman is entitled to the *Willa* of her emancipated ſlave in the ſame manner as a man;—becauſe of the tradition before quoted;—and alſo becauſe it is recorded that upon a freedman of *Hamazà* dying, and leaving a daughter, (*Hamazà* alſo being dead and having left a daughter,) the prophet divided his effects equally between this daughter and the daughter of *Hàmazà*.—It is alſo proper to obſerve that manumiſſion *for* a compenſation, and manumiſſion *without* a compenſation, are alike with reſpect to this rule, as the tradition abovementioned is abſolute.

A ſtipulation of waving the claim to inheritance is invalid.

If a perſon emancipate his ſlave, engaging, at the ſame time, that "he will not claim the right from him," ſuch engagement is null, and the *Willa* appertains to the emancipator notwithſtanding; becauſe the condition here mentioned is contrary to the text [of the KORAN,] and is conſequently invalid.

The *Willa* of a ſlave emancipated by *Kitàbat* appertains to his maſter;

Upon a *Mokâtib* paying his ranſom he is free, and the *Willa* belongs to his maſter, although he become free after his [the maſter's] deceaſe *; becauſe he becomes free in conſequence of a contract of *Kitàbat* to which his maſter was a party; and as a *Mokâtib*, like a *Modabbir*, is not a ſubject of inheritance, he is conſequently emancipated while the maſter's right of property continues.—The ſame rule alſo holds with reſpect to a ſlave whoſe maſter has *bequeathed* him manumiſſion,—or a ſlave whom a perſon directs, in his will, to be purchaſed and ſet free upon his deceaſe,—for the act of the executor, after the teſtator's death, is equivalent to the act of the teſtator.

Objection.—The ſlave in queſtion cannot be conſidered as emancipated from the *teſtator*, except where he is his actual property; and he diſcontinues from being his property becauſe of his death.

Reply.—The whole eſtate of the teſtator is regarded as his property as long as there is occaſion,—that is, until his will be executed.

and the ſame of the *Willa* of *Modabbirs*, *Am-Walids*.

If a maſter of ſlaves die, his *Modabbirs* and *Am-Walids* are free, (as has been explained in treating of *manumiſſion*,) and the *Willa* of them belongs to him †, as he emancipated them by making them *Modabbirs* and *Am-Walids*.

---

* In which caſe the *Willa* appertains to his heirs.

† Deſcending, as a heritage, to his heirs.

If

and ſlaves emancipated by *affinity.*

If a perſon become proprietor of a relation within the prohibited degrees, ſuch relation is free, (as has been explained under the head of *manumiſſion,*) and the *Willa* of him belongs to his perſon, as he is emancipated from his property.

In the emancipation of a pregnant female ſlave, the *Willa* of the fœtus belongs to her emancipator:

If a ſlave marry the female ſlave of any perſon, and ſhe become pregnant, and her maſter then emancipate her, ſhe is accordingly free, together with the fœtus in her womb;—and the *Willa* of the fœtus belongs to her maſter, and never can ſhift from him; becauſe he has emancipated it, not as a dependant of the mother, but independantly, and of itſelf, as being a portion of the mother, and it is capable of being ſo emancipated.—The *Willa* of the child, therefore, cannot ſhift from him, becauſe the prophet has ſaid, "*The* WILLA *belongs to the perſon who emancipates.*"—The ſame rule holds if the female ſlave be delivered of a child at any time ſhort of ſix months from the date of her manumiſſion, becauſe in this caſe the exiſtence of the fœtus at the time of manumiſſion is certified. The ſame rule alſo holds if ſhe be delivered of *two* children, one within the ſix months, and the other after they have expired; becauſe thoſe are twins, as having been begotten from one ſeed. It is otherwiſe where a female ſlave, being pregnant, enters into a contract of *Mawalát* with any perſon, and her huſband alſo enters into a ſimilar contract with any other perſon; for in this caſe the *Willa* of the child belongs to the maſter of the *father*, becauſe an embryo cannot of itſelf be a party to a *Mawalát* contract, as that is concluded by propoſal and acceptance, of which an embryo is incapable.

but if ſhe be not delivered within ſix months from the date of her manumiſſion, it may ſhift from him to the *father*'s emancipator.

If the female ſlave mentioned above be delivered of a child *after* ſix months from the date of manumiſſion, the *Willa* belongs to the *mother*'s maſter, becauſe the child is in this caſe free *as a dependant of the mother*, and is therefore a dependant of her with reſpect to the *Willa*. As, however, in this caſe, it is not certain that the child exiſted at the time of manumiſſion, ſo as that it ſhould be emancipated independantly

Digitized by Google

independantly and of itſelf, if the father be afterwards emancipated the *Willa* ſhifts from the maſter of the mother to the maſter of the father, becauſe of the child having become free, not of itſelf, but dependantly. It is otherwiſe where ſhe produces a child *within* ſix months, for in that caſe the *Willa* would not ſhift from the one maſter to the other. The ground of this is, that *Willa* ſtands in the ſame predicament with parentage; for the prophet has ſaid, "WILLA *is a relationſhip as much as the relationſhip of parentage, and cannot be ſold, or given away, or inherited.*" In the ſame manner, moreover, as *parentage* is eſtabliſhed on the part of the *father*, ſo alſo is *Willa*. Beſides, the *Willa* was referred to the mother's maſter, of neceſſity, merely becauſe of the father's incapacity: but upon the father becoming capable, the *Willa* reverts to his maſter;—in the ſame manner as the child of an aſſeverating woman * is of neceſſity referred to her family; but if her huſband afterwards retract his aſſertions, the parentage of it is then eſtabliſhed in him.—It is otherwiſe where a female ſlave is emancipated during her *edit* from the death of her huſband, who was a *Mokâtib*, and who has left effects ſufficient to diſcharge his ranſom,—and ſhe brings forth a child at any time within two years from the time of his deceaſe; becauſe in this caſe the *Willa* of the child appertains to the maſter of the mother; for as it is here impoſſible to refer the conception to a period ſubſequent to the father's deceaſe, it muſt therefore be referred to ſome time during his life;—and as the fœtus exiſted † at the time of her manumiſſion, the *Willa* of it therefore belongs to the mother's maſter, ſince he has emancipated the child by itſelf and independantly. It is alſo otherwiſe where a female ſlave is emancipated whilſt in her *Edit* from divorce, and brings forth a child within leſs than two years from the date of her manumiſſion; for in this caſe alſo, notwithſtanding her huſband be emancipated, the *Willa* of the child belongs to the mother's maſter, whether

---

* Meaning a woman repudiated in conſequence of *Laan*.

† Meaning "the child exiſted as (or, *in the ſtate of*) a *fœtus*."

Kitàbat by an infidel, in conſideration of an unlawful article, is valid; and if either party embrace the faith, the *value* of the article is due;

If a Chriſtian create his ſlave a *Mokâtib* in conſideration of wine, it is lawful, provided the quantity of the wine be ſpecified, and the ſlave be an infidel, becauſe wine, with reſpect to infidels, is the ſame as vinegar with reſpect to *Muſſulmans*.—The contract is therefore valid; and if afterwards either of the contracting parties embrace the faith, the maſter is entitled to the value of the wine, as *Muſſulmans* are prohibited from either making conveyance or taking poſſeſſion of that article.—The LAW, in this example, is different from that in the caſe of a *Zimmee* ſelling wine to another *Zimmee*; for if one of thoſe afterwards become a *Muſſulman*, the ſale (according to ſome) is invalid.—The reaſon of this is that the value of the *article* named is capable of conſtituting the ranſom, upon the inſtant of the contract,—(for if a perſon were to create his ſlave a *Mokátib* in conſideration of a *Waſeef*, or ſlave-boy, and the ſlave make a tender of the *value*, the maſter may be compelled to accept it,)—and ſuch being the caſe, it follows that it is alſo capable of conſtituting the ranſom in the *endurance* of the contract.—A valid ſale, on the contrary, cannot be concluded in conſideration of the *value* of the thing named.—Hence there is an evident difference between *Kitabat* and ſale.

but the ſlave is free *without* the *value*, if the maſter take poſſeſſion of the *article*.

If a Chriſtian create his infidel ſlave a *Mokátib* in conſideration of wine of which the quantity is known, and one of the contracting parties become a *Muſſulman*, and the maſter afterwards take poſſeſſion of the wine, the ſlave becomes free; for a contract of *Kitàbat* poſſeſſes the property of a contract of exchange; and conſequently, upon the maſter obtaining one of the two conſiderations, the ſlave is entitled to the other, which cannot be obtained without his freedom.

If the ſlave be a *Muſſulman* the contract is invalid.

If a Chriſtian create his *Muſſulman* ſlave a *Mokátib* in conſideration of wine, the *Kitàbat* is invalid, although the quantity of the wine be aſcertained, becauſe as a *Muſſulman* is incapable of undertaking any obligation for wine, the contract is conſequently unlawful.—Notwithſtanding this, however, if the ſlave deliver the wine he is free, for the reaſons explained in the beginning of this chapter.

CHAP. III.

Of Acts unlawful to a *Mokâtib*, or otherwiſe.

A *Mokâtib* may buy and ſell; and remove from place to place;

It is lawful for a *Mokâtib* to buy and ſell, and to remove from place to place; becauſe it is a requiſite of a contract of *Kitàbat* that the *Mokâtib* become free with reſpect to his actions, in ſuch a degree as may enable him independantly to perform whatever may be neceſſary towards the attainment of the deſign, namely, the obtainance of freedom in return for ranſom; and of this nature are purchaſe and ſale,—and ſo likewiſe journeying from place to place, ſince it may poſſibly happen that traffic is not to be found in one particular ſpot, and conſequently that there is a neceſſity for removing.

and execute a *Mohabàt*.

It is lawful for a *Mokâtib* to execute a *Mohabàt*[*], as that is a tranſaction of traffic, ſince merchants ſometimes buy or ſell in the manner of *Mohabàt* in one bargain, in order that they may derive a profit upon ſome other bargain.

---

[*] *Mohabàt* means buying an article at an *over*-value, or ſelling it at an *under*-value, which is ſometimes done with a view to induce the party to engage in ſome other tranſaction of a more advantageous nature. It is fully treated of elſewhere.

If

He may leave a place, although his maſter have ſtipulated otherwiſe.

If the maſter make it a condition with his *Mokâtib* that he ſhall not go forth from ſuch a particular place, (*Koofa*, for inſtance,) ſtill he is at liberty to go forth from thence, on a favourable conſtruction of the LAW,—becauſe a contract of *Kitàbat* requires that the *Mokâtib* be enabled independantly to poſſeſs himſelf of what he is to give as a ranſom, and that he have full power and title with reſpect to his own perſon, and the advantage to be obtained from his perſonal exertions. Now the condition in queſtion is repugnant thereto. It is conſequently null; but the contract is valid, becauſe the virtue of that cannot be effected by a condition of the nature here deſcribed.—Beſides, a contract of *Kitàbat* cannot be rendered invalid by the inſertion of ſuch a condition; becauſe *Kitàbat* reſembles ſale, and it alſo reſembles marriage: the contract in queſtion is therefore referred to ſale in all caſes where the inſertion of an invalid condition tends to invalidate the contract;—(as where, for inſtance, the maſter ſtipulates for an uncertain ſervice, by ſaying to his ſlave, "I create you a *Mokâtib* in "conſideration of your ſerving me *for a time*,"—which condition affects the virtue of the contract, as the ranſom is here made to conſiſt of ſervice for an indefinite term;)—and it is referred to marriage in all caſes where the inſertion of an invalid condition does *not* tend to invalidate the contract;—and it is cuſtomary, in practice, to proceed on either reſemblance.—Beſides, a contract of *Kitàbat* is a manumiſſion on the part of the ſlave, as being a deſtruction of the property in him; and as the condition in queſtion (that he ſhall not go forth from *Koofa*) is connected with the ſlave, the contract is accordingly a manumiſſion with reſpect to that condition; and manumiſſion is not annulled by the inſertion of an invalid condition.

He cannot *marry* without the conſent of his maſter.

It is not lawful for a *Mokâtib* to marry without the conſent of his maſter; becauſe a contract of *Kitàbat* operates to the removal of reſtriction, (under this qualification, that the *Mokâtib* ſtill continue the property of his maſter,) in order that it may be a means of accompliſhing the deſign; and *marriage* is not a means of accompliſhing the deſign, as it is not an acquiſition of property, but rather occaſions the *Mokâtib* to be employed in diſcharging his wife's dower, and providing her maintenance. His marriage is therefore unlawful without his maſter's conſent; but it is lawful if he conſent, ſince he is empowered in this particular.

He cannot beſtow gifts, or alms,

IT is not lawful for a *Mokâtib* to beſtow gifts or alms, except a trifle; becauſe gift and alms are gratuitous acts; and he is not poſſeſſed of any property in an *abſolute* manner, ſo as to be capable of conveying it.—The conveyance, however, of trifling matters is incidental to traffic; for it is neceſſary that he make entertainments and grant loans, in order to draw wealthy merchants about him; and a perſon who is empowered with reſpect to any thing, (ſuch as *trade*,) is alſo empowered with reſpect to its neceſſary incidents.

or become bail,

IT is not lawful for a *Mokâtib* to become bail; becauſe bail is an act peculiarly gratuitous, being neither neceſſarily incidental to commerce, nor to the acquiſition of property.—It is therefore unlawful for him to become bail, whether for the perſon or for property, as both ſpecies of bail are gratuitous.

or grant a *Karz* loan.

IT is not lawful for a *Mokâtib* to grant a *Karz* loan, becauſe that alſo is a gratuitous act not neceſſarily incidental to the acquiſition of property.—If, therefore, a *Mokâtib* make a gift of any thing, under condition of receiving ſomething in return, it is diſapproved, as this is *prima facie* a gratuitous act.

He may contract his *female* ſlave in marriage;

IF a *Mokâtib* contract his female ſlave in marriage, it is lawful, as being an acquiſition of property, becauſe in conſequence of ſo contracting her he obtains poſſeſſion of her dower.—The contract of *Kitabât*, therefore, comprehends this.

or create his [male or female] ſlave a *Mokâtib*;

If a *Mokâtib* create his ſlave a *Mokâtib*, it is lawful, on a favourable conſtruction. Analogy would ſuggeſt that it is unlawful, (and ſuch is the opinion of *Ziffer* and *Shafeï*,) becauſe *Kitabat* leads to manumiſſion, with reſpect to which he is not empowered;—in the ſame manner as manumiſſion for a compenſation; that is to ſay, as, if a *Mokâtib* were to ſay to his ſlave, "I emancipate you in conſideration "of one thouſand *dirms*," it is invalid, it would conſequently follow that his making his ſlave a *Mokâtib* is alſo invalid. The reaſon for a more favourable conſtruction, in this particular, is that a contract of *Kitàbat* is a contract for the acquiſition of property, wherefore the *Mokâtib* is empowered with reſpect to the point in queſtion, in the ſame manner as with reſpect to contracting his female ſlave in marriage, or with reſpect to ſale.—Making his ſlave a *Mokâtib*, moreover, may on ſome occaſions be more advantageous than ſale, becauſe his right of property is not deſtroyed by the *Kitàbat* until he have obtained the conſideration for it,—whereas his right of property is deſtroyed by ſale before he has obtained the price for the article ſold,—whence it is that a father or executor are at liberty to enter into a contract of *Kitàbat* with the ſlave of their infant ward. As, therefore, a *Mokâtib* may lawfully create his ſlave a *Mokâtib*, it follows that, in conſequence of the contract of *Kitàbat*, his ſlave is endowed only with every right with which he is himſelf endowed. It is otherwiſe in manumiſſion for a compenſation; becauſe in virtue of that the ſlave is endowed with that with which the *Mokâtib* is not himſelf endowed; ſince in conſequence of manumiſſion for a compenſation the ſlave is free upon the inſtant,—whereas the *Mokâtib*, in conſequence of the contract of *Kitàbat*, only becomes eventually entitled to freedom, but is not free upon the inſtant.

(in which caſe the *Willa* of ſuch *Mokâtib* reſts with the firſt *Mokâtib*'s maſter.)

If the *Mokâtib* of a *Mokâtib* pay his ranſom before the *Mokâtib* ſhall have himſelf become free, the *Willa* appertains to the maſter of the *Mokâtib*, becauſe the property of him veſts in one ſhape in the maſter.—Beſides, as the manumiſſion of the *Mokâtib*'s *Mokâtib* may

lawfully

Digitized by Google

lawfully be referred to the maſter of the *Mokâtib* on the inſtant of the contract, it follows that where it is impoſſible to refer it to the contracting party himſelf, becauſe of his incompetency, it muſt be referred to his maſter;—in the ſame manner as holds with reſpect to a ſlave licenced to trade; that is to ſay, if a ſlave licenced to trade purchaſe any thing, the property thereof veſts in his maſter, as it cannot veſt in the ſlave, ſince he is incapable of poſſeſſing property.—If, alſo, the *Mokâtib* ſhould afterwards diſcharge his ranſom, and become free, ſtill the *Willa* of his *Mokâtib* does not ſhift to him, becauſe his maſter had already been conſtituted the emancipator, and *Willa* cannot ſhift from the emancipator.—If, on the contrary, the *Mokâtib*'s *Mokâtib* pay the ranſom to the *Mokâtib* after he [the firſt *Mokatib*] has obtained his freedom, the *Willa* [of the ſecond *Mokâtib*] reſts with him [the firſt *Mokâtib*,] becauſe in this inſtance the party to the ſecond contract of *Kitàbat* is capable of having a right of *Willa* eſtabliſhed in him. Beſides, he is the original, or (in other words) the *perſonal* emancipator, and is conſequently entitled to the *Willa*.

He cannot emancipate his ſlave for a compenſation; or contract his *male* ſlave in marriage:

IF a *Mokâtib* emancipate his ſlave in return for property, or ſell his ſlave into his own hands, or contract him in marriage, it is unlawful, as none of theſe acts are either an acquiſition of property, or an appurtenance to acquiſition of property:—the firſt (namely, emancipation in return for property) is not ſo, becauſe that is a dereliction of right of property in the ſlave's perſon, and the eſtabliſhment of it is a debt upon one who is poor; nor is the ſecond ſo, becauſe that is alſo, in effect, a manumiſſion in return for property; neither is the third ſo, becauſe the act of contracting the ſlave in marriage vitiates and diminiſhes his value, and cauſes him to be occupied in diſcharging the debt of dower, and providing his wife a ſubſiſtance:—in oppoſition to contracting a *female* ſlave in marriage, as that is an acquiſition of property, ſince by it the dower is obtained, as was before explained.

A FATHER

(and the ſame rule holds with reſpect to a *guardian*,

A FATHER or executor* ſtand, with reſpect to their infant ward, in the ſame predicament as a *Mokâtib* with reſpect to his ſlave;—that is to ſay, it is unlawful for them to contract the [male] ſlave of their ward in marriage, or to emancipate him, or to ſell him into his own hands. But it is lawful for them to contract in marriage his *female* ſlave, or to enter into a contract of *Kitàbat* with his male or female ſlave, becauſe it is lawful for them to acquire property on behalf of their infant ward in the ſame manner as a *Mokâtib*; and alſo, becauſe contracting his female ſlave in marriage, or making his male or female ſlave *Mokâtib*, is conducive to his intereſt, whereas any thing beyond this is not ſo; and their authority is eſtabliſhed in regard to their ward with a view to his intereſt.

or a licenſed ſlave.)

A MAZOON, or ſlave licenced to trade, cannot lawfully perform any of the acts above deſcribed; that is to ſay, he can neither contract his male or female ſlave in marriage, nor make his ſlave a *Mokâtib*, nor emancipate him in return for property, nor ſell him into his own hands.—This is according to *Haneefa* and *Mohammed.*—*Aboo Yooſaf* maintains that he is at liberty to contract his *female* ſlave in marriage.—The ſame difference of opinion obtains with reſpect to a *Mozâribat* manager, a partner under partnerſhip by reciprocity, and alſo a partner under partnerſhip in arts; for *Aboo Yooſaf* conceives an analogy between thoſe and a *Mokâtib*; and as a *Mokâtib* is at liberty to contract his female ſlave in marriage the ſame is lawful to theſe likewiſe.—He, moreover, conceives an analogy between contracting a female ſlave in marriage, and letting her out to hire;—that is to ſay, as it is lawful for a *Mazoon*, a *Mozâribat* manager, &c. to let their female ſlave to hire, ſo in the ſame manner it is lawful for them to contract her in marriage, becauſe contracting her in marriage and letting her out to hire are both equally cauſes of advantage.—The arguments of *Haneefa* and *Mohammed* upon this point are twofold. FIRST, the ſlave in queſtion is merely empowered to trade, and contracting his female ſlave in marriage is not a tranſaction of trade, becauſe trade is an exchange of property for property, and contracting in marriage is not of this nature, ſince the connubial enjoyment is not property, evidently.—Contracting in marriage, therefore, reſembles *Kitàbat*; and as they are not empowered to make a ſlave *Mokâtib*, ſo in the ſame manner they are not empowered to contract a female ſlave in marriage. A *Mokâtib*, on the contrary, is empowered to acquire property; and the contracting his female ſlave in marriage is one mode of acquiring property.—SECONDLY, contracting a female ſlave in marriage is an exchange of property for what is not property. It therefore reſembles *Kitàbat*, and not *hire*, as that is an exchange of property for property, ſince uſufruct, in hire, ſtands in the place of property. It being therefore proved that contracting a female ſlave in marriage reſembles *Kitàbat*, and a contract of *Kitàbat* being unlawful to the ſlave in queſtion, it follows that contracting his female ſlave in marriage is likewiſe unlawful to him.

---

* The term *Waſſee*, in this place, ſignifies a guardian appointed by will; in oppoſition to a *Wallee*, or *natural* guardian.

SECTION.

The parent or child of a *Mokâtib*, purchaſed by him, are included in his *Kitàbat*;

IF a *Mokâtib* purchaſe his father or his ſon, they are included in his *Kitàbat*;—that is to ſay, they become *Mokâtibs* dependantly;—becauſe, as a *Mokâtib* poſſeſſes capacity to make a *Mokâtib*, although he be not capable of granting emancipation, they therefore are rendered *Mokâtibs*, in order that the ties of kindred may be as far as poſſible preſerved; for as, if their relation, being a freeman, were to become poſſeſſed of them, they would alſo become free, in conſequence of a freeman being empowered to beſtow manumiſſion upon his ſlave, ſo in the ſame manner they in the preſent inſtance become *Mokâtibs*, in conſequence of the *Mokâtib* in queſtion being empowered to create his ſlave a *Mokâtib*.

but relations not within the degree of paternity are not ſo included.

If a *Mokâtib* purchaſe a kinſman related to him within the prohibited degrees, but not within the degree of paternity, he is not included in his *Kitabat*, according to *Haneefa*.—The two diſciples alledge that he alſo is included in his *Kitàbat*, in the ſame manner as a paternal relation, as the obligations of kindred extend equally to both, whence it is that the prohibited relation of a freeman becomes free upon being purchaſed by him.—The arguments of *Haneefa* upon this point are twofold.—First, a *Mokâtib* is empowered with reſpect to the acquiſition of property, but not with reſpect to the property acquired.—The power he enjoys, however, of acquiring property, ſuffices for the performance of the duties of paternity, whence it is incumbent upon a perſon enabled to acquire property, to afford ſubſiſtence to his parents and children,—but it does not ſuffice for the performance of any other than the duties of paternity, whence the ſubſiſtence of a brother is not incumbent except upon a wealthy brother.—Secondly, the fraternal affinity is a medium between the avuncular which is diſtant, and the paternal which is near; and it is accordingly referred to the paternal with reſpect to freedom, and to the avuncular with reſpect to *Kitàbat*;—and this arrangement is preferable to the reverſe, becauſe manumiſſion is more extenſive in its operation than *Kitàbat*, inſomuch that if one of two partners make his ſhare in a ſlave *Mokâtib*, the other partner is at liberty to annul it,—whereas if one were to *emancipate* his ſhare, the other could not annul it.

His child, born of his *Am-Walid*, is included; and the *Am-Walid* cannot be ſold.

If a *Mokâtib* purchaſe his *Am-Walid*, (that is, his wife, whom he married when ſhe was the ſlave of another, and who has borne a child to him,) his child born of her is included in his *Kitàbat*, and it is unlawful for him to ſell the *Am-Walid*.—The child becomes a *Mokâtib*, becauſe of what was before ſaid "in order "that the ties of kindred may be as far as poſſible preſerved:"—and the mother cannot lawfully be ſold, as ſhe is a dependant of her child in effect, the prophet having ſaid (ſpeaking of an *Am-Walid)* "*her* "*child hath ſet her free.*"—What is here advanced proceeds on the ſuppoſition that the *Mokâtib* becomes proprietor of the *Am-Walid*, together with her child. If it be otherwiſe, he having purchaſed her alone, in that caſe alſo the ſame effect obtains, according to *Aboo Yooſaf* and *Mohammed*, becauſe of her being his *Am-Walid:* in oppoſition to *Haneefa*, who contends that ſhe may in this caſe be lawfully ſold; becauſe analogy ſuggeſts that the ſale of her is lawful notwithſtanding he become poſſeſſed of her along with her child; for the right over property of a *Mokâtib*'s earning is ſuſpended, (ſince, if he pay his ranſom, it becomes appropriated to him, or if he fail in this, it becomes appropriated to his maſter,) and ſuch being the caſe, no right incapable of diſſolution can be connected with it, for if ſo, it would follow that ſuch right is annulled upon the *Mokâtib* failing to pay his ranſom; and the prohibition againſt ſelling her, on account of her being an *Am-Walid*, is incapable of annulment. The right in queſtion, however, is eſtabliſhed with reſpect to her, dependantly, in a caſe where he becomes poſſeſſed of her together with her child, becauſe of that right being eſtabliſhed with reſpect to the child; whereas if it were eſtabliſhed independant of the child, it would follow that the right in queſtion is eſtabliſhed with reſpect to her *prima facie*, to which analogy is repugnant.

His child, born of his ſlave, is alſo included; and its earnings appertain to him.

IF a child be born to a *Mokâtib*, by his female ſlave, it is included in his *Kitàbat*, for the reaſon aſſigned in the preceding example; and the child becomes ſubject to the ſame rules with the *Mokâtib*. The earnings of the child are therefore the earnings of the *Mokâtib*, as being the earnings of the *Mokâtib*'s earnings; wherefore the *Mokâtib*'s excluſive right to thoſe earnings cannot be affected by any claim which may be afterwards ſet up to them.

The child of a *Mokâtibá* is included in her *Kitàbat*, and cannot be ſold.

If a *Mokâtibá* bear a child to her huſband, ſuch child is included in her *Kitàbat*; and the ſale of it is unlawful, becauſe as the right of being unſaleable is eſtabliſhed with reſpect to the *Mokâtibá*, it conſequently extends to her child, in the ſame manner as *Tadbeer* or *Iſteelad*. (The caſe of *Iſteelad*, here alluded to, is where a perſon contracts his *Am-Walid* in marriage to another, and ſhe bears a child,—in which caſe that perſon cannot lawfully ſell the child, as the unſaleableneſs of the *Am-Walid* extends to her offspring.)

A child begot by a *Mokâtib* upon a *Mokâtibá*, is included in the *Kitàbat* of the *mother*.

If a perſon contract his female ſlave in marriage to his male ſlave, and afterwards create them both *Mokâtibs*, and they have a child, it is included in the *Kitàbat* of the mother, and its acquiſitions appertain to her; becauſe the dependance on the *mother* has the ſuperiority, as the qualities eſtabliſhed in the mother extend to her offspring; and accordingly, a child is a dependant of its mother with reſpect to *bondage* and *freedom*.

The children of a *Mokâtib* by a woman who proves a ſlave are ſlaves, and cannot be demanded by him.

If a *Mokâtib* marry, with the conſent of his maſter, a woman who declares herſelf free, and they have children, and the woman be afterwards claimed as a ſlave, their children are in ſuch caſe ſlaves[*], and the father is not entitled to demand them for their value; and ſo likewiſe, if a *ſlave* marry, with the conſent of his maſter, a woman under ſuch circumſtances. This is according to *Haneefa* and *Aboo Yooſaf*. *Mohammed* alleges that the children are free for their value; in other words, the father is entitled to take them upon paying their value, and they then are free; the reaſon of which is, that as the ſlave or *Mokâtib* married the woman purely under the idea that his children ſhould be free, they are therefore in the ſame predicament with the ſlave of a *Magroor*, or perſon acting under a deception. The argument of the two diſciples is, that as the children in queſtion are the offspring of *two ſlaves*, (for their father and mother are both ſlaves,)

---

[*] To the owner of the *mother*.

ſlaves,) it follows that they alſo are ſlaves.—The ground of this is that it is a rule that a child is a dependant of its mother with reſpect to bondage and freedom.—This rule is, however, abandoned in the caſe of a free perſon acting under a deception, by all the companions. But a ſlave or a *Mokâtib*, acting under a deception, are not in the preciſe predicament with a *free* perſon ſo acting; becauſe, where the perſon who acts under a deception is *free*, he may be ſued for the value of his child *upon the inſtant*, (according to *Mohammed*,) whereas a *Mokâtib*, *Modabbir*, or *ſlave* ſo circumſtanced, in caſe of having married without their owner's approbation, cannot be ſued for the value of their child until after they have themſelves become free.—As therefore a ſlave or a *Mokâtib*, acting under a deception, are not in the preciſe predicament with a free perſon ſo acting, it follows that their child muſt not be confounded with the child of a deceaſed *freeman*, but continues in its original ſtate.

Caſe of a *Mokâtib* cohabiting with the ſlave of another without his conſent.

IF a *Mokâtib* have carnal connexion with the female ſlave of another, in virtue of a ſuppoſed right of bondage, without the conſent of her maſter, (in this way, that he purchaſes a ſlave, and cohabits with her, and the ſlave afterwards proves the property of another,) he muſt in this caſe pay * an *Akir*, or fine of treſſpaſs, to the value of her proper dower, and is liable to be ſued for it during the term of his *Kitàbat*. If, on the contrary, he had cohabited with the ſlave in virtue of *marriage* †, he could not be ſued for the fine until he had obtained his freedom. A *Mazoon*, or ſlave licenſed to trade, is alſo ſubject to the ſame rule. The difference between a caſe of cohabitation in virtue of a right of bondage and in virtue of marriage is, that in the former caſe a *debt* is eſtabliſhed with reſpect to the maſter; becauſe a contract of *Kitàbat* comprehends traffic and its incidents; and the fine is an incident of traffic, and muſt be referred thereto; for if the *Mokâtib* had not purchaſed the ſlave, he could not eſcape puniſhment,

---

* To her maſter.

† Without the conſent of her owner.

ment, ſince where puniſhment is not remitted the fine is not due: hence the fine is regarded as *a debt of trade.* In the *ſecond* caſe, on the contrary, the debt is not eſtabliſhed with reſpect to the maſter; becauſe in this inſtance the obligation of the fine is on account of an erroneous marriage; and as marriage is neither a branch of traffic nor a means of acquiring property, it is not comprehended in a contract of *Kitàbat*, in the ſame manner as *bail* is not comprehended therein.—The payment of the fine, therefore, in this inſtance, is delayed until the *Mokâtib* ſhall have become free; in the ſame manner as, if a *Mokâtib* enter into a contract of bail, he cannot be ſued upon it until he have obtained his freedom, bail not being a branch of traffic.

If a *Mokâtib* purchaſe a female ſlave by an invalid contract, and cohabit with her, and then return her to her owner, he may be ſued for the fine during his *Kitàbat*; and the ſame of a *Mazoon*, or ſlave licenſed to trade; becauſe this is a circumſtance appertaining to traffic; and tranſactions are ſometimes valid and ſometimes invalid; and *Kitàbat* and licenſe to trade comprehend both valid tranſactions and invalid; in the ſame manner as agency;—in other words, if a perſon appoint another his agent for purchaſe or ſale, (for inſtance,) the agency comprehends both valid and invalid purchaſe or ſale; and ſo alſo in the preſent inſtance.—The tranſaction is therefore eſtabliſhed as affecting the maſter.

SECTION.

A *Mokatibâ*, bearing a child to her maſter, may undo the contract, and

If a female ſlave, having been made a *Mokâtibâ*, bear a child to her maſter, ſhe has it at her option either to adhere to the contract of *Kitàbat*, or to incapacitate herſelf from paying ranſom, and to become an *Am-Walid* to her maſter; becauſe here exiſts two cauſes of freedom, become his *Am-Walid:*

dom, in virtue of one of which freedom may be obtained immediately, but for a conſideration,—and in virtue of the other it may be obtained after delay, but without any conſideration.—She has therefore an option of either.—The parentage of her child is moreover eſtabliſhed in the maſter, and the child is conſequently free, although it be an acquiſition of the female ſlave; becauſe the claim laid to it by the maſter is tantamount to manumiſſion; and as the maſter has it in his power, without any particular motive, to emancipate the child where it is *not* ſprung from him, it follows that he is entitled, *a ſuperiori*, to emancipate it under a claim; and the maſter's right of property, exiſting with reſpect to the ſlave, ſuffices for the purpoſe of rendering valid *Iſteelâd* under a claim. It is to be obſerved that if the female ſlave in queſtion adhere to her contract of *Kitàbat*, ſhe is entitled to a fine of *Akir* from her maſter, becauſe her perſon and the uſe of it are her excluſive right, as was before explained.

or, if ſhe adhere to the contract, ſhe nevertheleſs becomes free upon his deceaſe, without ranſom.

If the *Mokâtibâ*, in the above example, adhere to the contract of *Kitàbat*, and her maſter die, ſhe becomes free, as being his *Am-Walid*; and her ranſom is remitted. If, on the contrary, ſhe ſhould die, and leave property, her ranſom is paid out of that property, and whatever remains goes to her child, in virtue of inheritance, according to the intendment of the contract. If, however, ſhe leave no property, yet her child is not required to perform emancipatory labour, as it is free at all events.

If ſhe bear a *ſecond* child, and die inſolvent, this child muſt perform emancipatory labour, unleſs the maſter father it.

If the *Mokâtibâ* mentioned in the above example bring forth *another* child, it is not incumbent upon the maſter to father it; becauſe it is not lawful for him to have carnal connexion with her.—If, therefore, the maſter ſhould not claim this child, and ſhe die, without leaving effects to diſcharge her ranſom, this child muſt perform emancipatory labour, as being a *Mokâtib*, in conſequence [as a dependant] of the mother.—If, however, the maſter afterwards die, the child is free, and is excuſed from emancipatory labour, as ſtanding in the predicament of an *Am-Walid*; for it is the offſpring of an *Am-Walid*, and conſequently partakes of her priviledges as a dependant of her.

An *Am Walid* may be conſtituted a *Mokâtibâ*;

If a maſter enter into a contract of *Kitàbat* with his *Am-Walid*, it is lawful; becauſe ſhe is here deſirous of obtaining her freedom *before* the deceaſe of her maſter, and this end is obtained by means of a contract of *Kitàbat*: neither is her being an *Am-Walid* at all repugnant to the contract of *Kitàbat*, ſince both thoſe means of freedom may unite in her, and ſhe may obtain her freedom, in virtue of the one immediately, by the payment of her ranſom,—or, in virtue of the other, after a delay, independant of ranſom.—The contract in queſtion is therefore valid.—But if her maſter afterwards die, ſhe becomes free in virtue of being an *Am Walid*, as her freedom was ſuſpended upon his deceaſe:—and in this caſe ſhe is excuſed from the ranſom; becauſe her deſign, in entering into the contract, and engaging for a ranſom, was merely to procure her freedom upon paying it; but as ſhe here becomes free *before* having paid it, it is impoſſible for her to acquire freedom *upon* paying it, ſince a thing already obtained cannot be obtained again.—Her ranſom therefore drops, and the contract of *Kitàbat* becomes null, as its continuance is in this caſe uſeleſs.

Objection.—As the contract of *Kitàbat* is annulled and broken off by the maſter's deceaſe, it would follow that the acquiſitions of the *Mokâtibâ*, together with the children not begotten by her maſter, and born during the *Kitàbat*, appertain to the maſter's eſtate;—whereas it is not ſo.

Reply.—The contract of *Kitàbat* is annulled with reſpect to the ranſom, but remains in force with reſpect to the acquiſitions and children of the *Mokâtibâ*; becauſe the annulment of the contract is out of tenderneſs to her intereſt, which is obſerved in annulling it with reſpect to the ranſom, but not with reſpect to thoſe other particulars, for if it were annulled with reſpect to them, it would follow that they became the property of the maſter's heirs.

And the ſame of a *Modabbirá.*

IF a perſon enter into a contract of *Kitàbat* with his *Modabbirá*, it is lawful, for the reaſon aſſigned in the preceding example, that "ſhe "is deſirous of obtaining her freedom *before* the deceaſe of her "maſter:"—neither is her being a *Modabbirá* repugnant to the contract of *Kitàbat*; for ſhe is not, in virtue of *Tadbeer*, free at *preſent*, but is merely endowed with a right to *ultimate* freedom, upon the deceaſe of her owner. If, in this inſtance, the maſter die, leaving no property except the *Modabbirá* in queſtion, ſhe has it at her option to perform emancipatory labour, either for two thirds of her eſtimated value, or for the whole of her ranſom. This is according to *Haneefa.* *Aboo Yooſaf* holds that ſhe is to perform emancipatory labour to a degree equivalent to the leaſt of the two.—*Mohammed* maintains that ſhe is to perform emancipatory labour to the amount of what is leaſt, two thirds of her value, or two thirds of her ranſom. Thus there is a difference of opinion with reſpect both to the *amount* and the *option*; and *Aboo Yooſaf* coincides with *Haneefa* in regard to the one, and with *Mohammed* in regard to the other. The right of option, in this inſtance, is derived from the diviſibility of manumiſſion, as maintained by *Haneefa*; becauſe as (according to him) manumiſſion admits of being divided into parts, one third of the *Modabbirá* becomes free on the inſtant, and two thirds continue in bondage;—and as two cauſes of manumiſſion operate, with reſpect to the other two thirds, for two different conſiderations, (one of which is of immediate effect, in virtue of *Tadbeer*, and the other of deferred effect, in virtue of *Kitàbat*,) the *Modabbirá* has therefore an option of either. According to the two diſciples, on the contrary, manumiſſion is indiviſible. Hence the *whole* of the *Modabbirá* is free in conſequence of a *part* of her being ſo; and ſhe, as being conſequently free, owes one of the two conſiderations, of which ſhe will undoubtedly prefer paying that which is the *ſmalleſt.* Her having an option is therefore uſeleſs.—With reſpect to the point on which *Mohammed* differs both from *Haneefa* and from *Aboo Yooſaf*, namely the amount, the argument he urges is that the maſter had oppoſed the whole ranſom to the whole of the *Modabbirá*'s perſon; but ſhe has already ſecured to herſelf *one* third of the whole in virtue of *Tadbeer*, and it is conſequently impoſſible that any ranſom ſhould be due for that third; for as, if ſhe had ſecured her *whole* perſon to herſelf, by that conſtituting only a third of the deceaſed's property, the whole of her ranſom would have been remitted, it follows that one third is remitted in the preſent inſtance;—in the ſame manner as where a maſter firſt makes his ſlave a *Mokâtib*, and then grants him *Tadbeer*,—in which caſe one third of his ranſom is remitted,—and ſo likewiſe in the caſe in queſtion.—The argument of the two *Elders* is that the whole of the *Kitàbat* is oppoſed to two thirds of the *Modabbirá*, and conſequently no part of it can be remitted. The ground of this is that the ranſom, although it be oppoſed to the *whole* of the *Modabbirá* in regard both to *appearance* and *letter*, is nevertheleſs reſtricted to two thirds of her in regard to *reality* and *deſign*; becauſe ſhe has already become, in appearance, entitled to the freedom of one third of her perſon; and it is evident that men do not engage for property, as oppoſed to a thing to the freedom of which they are already entitled;—as, for inſtance, if a perſon pronounce two divorces upon his wife, and afterwards agree "to give her three divorces for one thouſand *dirms*," the whole thouſand are oppoſed to the one remaining divorce required to make up that number, becauſe apparent circumſtances argue that ſuch is his deſign, ſince only one divorce remains to be given;—and ſo likewiſe in the preſent inſtance.—It is otherwiſe where a maſter firſt creates his ſlave a *Mokâtibá*, and afterwards grants her *Tadbeer*, for in that caſe the ranſom was oppoſed to her *whole* perſon, as ſhe was not at the time of concluding the contract of *Kitàbat*, entitled to the freedom of any part of her perſon.—There is therefore an evident difference between the caſes.

A *Mokâtibá* may be conſtituted a *Modabbirá*.

If a perſon grant *Tadbeer* to his *Mokâtibá*, it is lawful; becauſe ſhe ſtands in need of freedom; and her becoming a *Modabbirá* is not repugnant to the contract of *Kitàbat*, as was before ſtated. In this caſe the ſlave has it at her option either to adhere to the contract of *Kitàbat*, or to incapacitate herſelf from paying ranſom, and to become a *Modabbirá*, becauſe a contract of *Kitàbat* is not binding on the part of a ſlave*. If, therefore, ſhe adhere to the contract, and her maſter die, and leave no property beſides, ſhe has it at her option to perform emancipatory labour, either for two thirds of her ranſom, or for two thirds of her eſtimated value.—This is according to *Haneefa*. The two diſciples maintain that ſhe has no option, but is to perform emancipatory labour for that which is the leaſt of the two. Thus the difference, in this caſe, concerns only the *option*, in conſequence of that being derived (according to *Haneefa*) from the diviſibility of manumiſſion, as before ſet forth; for they all agree concerning the *amount*, ſince in this inſtance the ranſom is oppoſed to the *whole* of the ſlave's perſon, as was explained above.

A *Mokâtib* may be emancipated *gratis*.

IF a maſter grant manumiſſion to his *Mokâtib*, he is accordingly free, becauſe the maſter is proprietor of his perſon, and therefore poſſeſſes the power of emancipating him:—and in this caſe the ranſom is remitted from the *Mokâtib*; becauſe he engaged for it ſolely as oppoſed to his emancipation; but as that has been obtained without ranſom, it is conſequently not due.

OBJECTION.—It would here appear that the *Mokâtib* is not free, as the contract of *Kitàbat* is binding on the part of his maſter.

REPLY.—Although the contract of *Kitàbat* be binding on the part of the maſter, yet it may be broken with the conſent of the *Mokâtib*; and it is evident that the *Mokâtib* conſents to the breach of it in the preſent inſtance, in order that he may be emancipated without paying ranſom. Notwithſtanding this, however, his acquiſitions remain ſecured to him; becauſe the contract is annulled only with reſpect to the ranſom, out of tenderneſs to his intereſt.

---

* That is to ſay, a ſlave is at liberty to break off, or fail in, the fulfilment of a contract of *Kitàbat*, although the *maſter* have not this liberty.

IF

An abatement may be made from the ranſom, in conſideration of prompt payment.

If a perſon create his ſlave a *Mokâtib*, in conſideration of one thouſand *dirms*, on a credit of one year, and afterwards enter into a compoſition with him for five hundred *dirms* prompt payment, it is lawful, on a favourable conſtruction. Analogy would ſuggeſt that it is unlawful, becauſe it would hence appear that the maſter had in this inſtance oppoſed one thouſand *dirms* to five hundred *dirms*, and credit for one year, which, as credit is not property, and as the debt of ranſom is property, would be uſurious;—whence it is that a tranſaction of the nature here deſcribed is not lawful with reſpect to a freeman, or the *Mokâtib* of a ſtranger;—that is to ſay, if a perſon have a deferred debt owing to him from a freeman, and compound with him for one half of his right, prompt payment, it is unlawful;—and in the ſame manner, if a perſon have a deferred debt owing to him from the *Mokâtib* of a ſtranger, and compound with him on the ſame terms, it is alſo unlawful. The reaſons, however, for a more favourable conſtruction of the law in this particular are twofold.—First, the credit granted to the *Mokâtib*, although in one ſhape it be not property, yet is in another ſhape property; for as the *Mokâtib* is unable to pay his ranſom but by means of the credit, it follows that the credit is virtually property with reſpect to him. The ranſom, on the other hand, although it be property in one ſhape, yet is not ſo in another ſhape, inſomuch that bail cannot be given for it.—The credit, therefore, ſtands upon the ſame footing with the ranſom:—conſequently, the tranſaction was only the acceptance of a conſideration of what was property in one ſhape in return for what was alſo property in one ſhape; and as the conſideration and the return were of different kinds, there was therefore no uſury in it.—Secondly, A contract of *Kitàbat* is a contract in one ſhape;—but it is not ſo in another ſhape; becauſe a maſter cannot have a claim for debt upon his ſlave, and alſo becauſe it [the contract] has a ſemblance to *Yameen*, or conditional vow, as it is a ſuſpenſion of emancipation upon the payment of a conſideration.—The ſum of five hundred *dirms*, alſo, oppoſed to the credit, is uſury in one ſhape but not in another, for if the credit granted

Digitized by Google

granted be not accounted property, it is uſury,—whereas if the credit *be* accounted property, uſury is not induced, ſince in ſuch caſe it is merely property oppoſed to property. The uſury, therefore, is at all events dubious; and where dubious uſury occurs in a contract which is itſelf of a dubious nature, it is *doubly* dubious, and conſequently is not regarded.—It is otherwiſe in a contract between two freemen, as that is in every ſhape a contract, and conſequently the circumſtance of a credit being granted in it occaſions a ſemblance of uſury.

A credit granted with reſpect to the ranſom, without the conſent of the maſter's heirs, expires upon his deceaſe; and the *Mokâtib* muſt pay them two thirds of it immediately;

If a ſick perſon * enter into a contract of *Kitàbat* in conſideration of two thouſand *dirms*, on a credit of one year, with his ſlave whoſe value is *one* thouſand, and afterwards die, leaving no other effects but this ſlave, and the heirs of the deceaſed had not acceded to the credit granted, in this caſe he [the ſlave] muſt pay two thirds of his *Kitàbat* immediately, and agree to pay the remainder within the term of credit, or he again becomes an abſolute ſlave.—This is according to *Haneefa*.—According to *Mohammed* he muſt pay two thirds of *one* thouſand immediately, and the remainder within the term of credit; becauſe as it would have been lawful for the maſter to have remitted the remainder altogether, by making the ſlave a *Mokâtib* in conſideration only of his *value*, it follows that he was at liberty to poſtpone it to the term of credit ſpecified;—in the ſame manner as where a ſick perſon enters into an agreement of *Khoola* with his wife, in conſideration of one thouſand *dirms*, on a credit of one year, and dies, leaving no property except thoſe thouſand *dirms*, and his heirs had not acceded to the credit granted the wife;—for in this caſe the credit is nevertheleſs valid with reſpect to the whole ſum mentioned; becauſe as the deceaſed was at liberty to have pronounced a divorce upon his wife without receiving any conſideration, it was conſequently in a ſuperior degree lawful for him to poſtpone the payment to the term of credit ſpecified.—The argument of the two *Elders* is, that the ſum in queſtion (namely the two thouſand) is the conſideration for the *whole* of the ſlave's perſon, whence it is that the laws concerning conſiderations obtained with reſpect to it;—and as the right of the heirs is connected with the return, namely, with the ſlave's perſon, ſo it is in the ſame manner connected with the conſideration for the perſon.—Now agreeing to poſtpone the conſideration is in one ſhape a dereliction; and it is therefore regarded as applying to one third of the whole property named. It is otherwiſe in the caſe of *Khoola*; becauſe as, in that caſe, the conſideration is not oppoſed to property, the right of the heirs is not connected with the return, namely, the uſe of the woman's perſon, whence it is that their right is alſo unconnected with the conſideration for it.—Analogous to the difference of opinion in the preſent inſtance, is that which obtains in the caſe of a ſick perſon ſelling his houſe, valued at one thouſand *dirms*, for three thouſand, on one year's credit, and then dying, and leaving no effects except the price abovementioned;—for in this caſe, according to the two *Elders*, the purchaſer muſt be required to pay down two thirds of the whole price immediately, and the remainder within the time promiſed, or to diſſolve the contract of ſale;—whereas, according to *Mohammed*, regard is had to the third of the *value*, not to the third of what *exceeds* the value;—the reaſons of which have been explained above.

---

* Arab. *Mareez*;—always (in the language of the LAW) meaning a *dying* perſon. The caſe here conſidered turns entirely upon the general rule, that a dying perſon is not at liberty to perform any act which might have a tendency to affect the right of his heirs, beyond *one third* of his eſtate.

or two thirds of his *value*, if the ranſom fall ſhort of that.

If a ſick perſon make his ſlave, valued at two thouſand *dirms*, a *Mokátib* for one thouſand, on a credit of one year, and then die, leaving no property except the *Mokâtib*, and the heirs do not confirm the credit, he [the *Mokátib*] muſt pay down two thirds of his value immediately, or he again becomes an abſolute ſlave, according to all our doctors; becauſe as this caſe involves a *Mohabât* with reſpect both to the ſlave's value and to the credit granted, regard is therefore had to one third with reſpect to both.

CHAP.

CHAP. IV.

Of a Perſon tranſacting a *Kitàbat* on behalf of a Slave.

A ſlave is free upon another perſon engaging for and paying his ranſom; or, on acceding to the engagement he becomes a *Mokâtib*.

If a freeman agree to a contract of *Kitàbat* on behalf of a ſlave, on a conſideration of one thouſand *dirms*, in this caſe, provided he pay thoſe thouſand on behalf of ſuch ſlave, he [the ſlave] is free; or, if the ſlave receive intelligence of the contract, and accede to it, he becomes a *Mokâtib*. The nature of this caſe is that a free perſon ſays to the maſter of a ſlave, " make your ſlave a *Mokâtib*, in conſideration of one " thouſand *dirms*, on this condition, that if I pay you the ſaid thou- " ſand, he ſhall be free,"—and the maſter accordingly makes his ſlave a *Mokâtib*,—in which caſe he [the ſlave] is made free by the freeman in queſtion paying the money, agreeably to ſtipulation:—and if the ſlave accede upon receiving intelligence of the tranſaction, he becomes a *Mokâtib*, becauſe the contract was ſuſpended upon his conſent, and his acquieſcence is conſent.—If, in this caſe, the freeman in queſtion were not to add, as above, " on this condition, that if I pay you the " ſaid thouſand, he ſhall be free," and afterwards pay the money, ſtill analogy would ſuggeſt that the ſlave is not thereby emancipated, becauſe in this inſtance no ſtipulation has been made for his freedom, and the contract is ſuſpended, in its effect, upon his conſent. He is, however, emancipated in this caſe alſo, on a favourable conſtruction, becauſe an abſent ſlave ſuſtains no injury from his freedom being ſuſpended on the condition of a freeman paying his ranſom. The contract of *Kitàbat* is therefore valid in this inſtance alſo, and remains ſuſpended, in its effect, upon the aſſent of the ſlave, merely with reſpect to the thouſand *dirms* being obligatory upon *him*.—(Some ſay that this is the caſe ſtated by *Kadooree*.)—It is to be obſerved that, in this caſe, the freeman, where he pays the ranſom himſelf, is not entitled to any thing from the ſlave, becauſe in ſo doing he acted gratuitouſly.

Caſe of a ſlave engaging in a *Kitàbat* for himſelf and another ſlave.

If a ſlave agree to a contract of *Kitàbat* on behalf of himſelf and another ſlave, who is the property of his maſter, and abſent,—in this caſe, whether the ranſom be paid by the ſlave preſent, or by the abſentee, they are both emancipated.—The nature of this caſe is that a ſlave ſays to his maſter, “make me a *Mokâtib*, together with ſuch an “abſent ſlave, in conſideration of one thouſand *dirms*,” and the maſter makes them *Mokâtibs* accordingly,—which is valid, on a favourable conſtruction.—Analogy would ſuggeſt that the contract is valid with reſpect to the preſent ſlave only, as he has a power over his own perſon;—but that it is ſuſpended with reſpect to the abſentee, as the one who is preſent has no power over *his* perſon.—The reaſon for a more favourable conſtruction is, that the preſent ſlave, in firſt referring the contract to himſelf, rendered himſelf the principal, and the abſentee a dependant;—and a contract of *Kitàbat* of this nature is agreeable to law;—as where, for inſtance, a female ſlave is created a *Mokâtibâ*, in which caſe her children are included in her contract of *Kitàbat*, inſomuch that they alſo become free upon her paying the ranſom, without any thing being incumbent upon them.—It being therefore poſſible, in this way, to allow validity to the contract, the preſent ſlave is conſequently empowered to agree to the contract by himſelf; and hence the maſter is entitled to take the whole ranſom from him, [the preſent ſlave,] ſince, as he is principal, it all reſts upon him: but nothing is incumbent upon the abſentee, as he is merely a dependant.—Whoever, alſo, of the two ſlaves, pays the ranſom, they are both free: and the maſter may be compelled to receive it from whoever of them makes a tender of it;—from the *preſent* ſlave, becauſe it is from him that the debt is due; for from the *abſent* ſlave, becauſe, although the debt be not due from him, yet it is by the payment thereof that he obtains his freedom;—in the ſame manner as where a pawner makes a tender of his debt; in which caſe the pawnholder

holder may be compelled to accept it, becauſe of the pawner having occaſion to redeem his pledge, although there be no debt upon his *perſon*. Upon either of the ſlaves in queſtion paying the ranſom, he has no claim whatever againſt the other; becauſe if the *preſent* ſlave paid it, he in ſo doing paid a debt which was owing by him: or if the *abſentee* paid it, he in ſo doing acted voluntarily, ſince he was under no neceſſity to pay it. It is to be obſerved that the maſter, in this caſe, cannot ſue the abſentee ſlave for any thing; becauſe he undertook for nothing, being merely a dependant, it being the ſame thing whether he conſented to the contract or not. As, moreover, the contract in queſtion is binding upon the *preſent* ſlave, becauſe of its operating upon him independant of the abſentee's aſſent, it follows that no change is wrought in it by ſuch aſſent,—in the ſame manner as where a perſon becomes bail for another without his deſire, and he, upon hearing of it, gives his aſſent; in which caſe the effect of the bail is not altered, inſomuch that if the perſon who thus gave bail ſhould pay any thing on that account, the creditor has no claim upon the perſon bailed; and ſo alſo in the preſent inſtance.

Caſe of a female ſlave engaging in a *Kitàbat* for herſelf and her children.

If a female ſlave agree to a contract of *Kitàbat* on behalf of herſelf and of her two infant children, it is lawful;—and whoever of them pays the ranſom has a claim upon the others for their proportions;—and upon any one of them paying the ranſom they are all free; becauſe the female ſlave conſtituted herſelf the principal, and her children the dependants, for the reaſons ſtated in the preceding example; and ſhe was ſtill more competent than a *ſtranger* ſo to do.

CHAP.

CHAP. V.

Of the *Kitàbat* of *Partnerſhip Slaves.*

Caſe of a partnerſhip ſlave, made *Mokâtib* by one of two partners, paying part of his ranſom, and failing with reſpect to the *complete* diſcharge of it.

If a ſlave be held in partnerſhip between two men, and one of them give permiſſion to the other to create his ſhare in the ſlave *Mokâtib*, in conſideration of one thouſand *dirms*, and that he ſhall take poſſeſſion of the ſaid ranſom, and this partner accordingly create his ſhare *Mokâtib*, and receive a part of the ranſom, and the ſlave afterwards become incapable of completely diſcharging it, he [the contracting partner] is in this caſe entitled to retain the part he has received, according to *Haneefa*. The two diſciples maintain that the ſlave becomes a *Mokâtib*, in equal proportions, to both maſters, and that, conſequently, what he has paid is ſhared equally between them.—The ground of this difference of opinion between our doctors is, that *Kitàbat* is ſuſceptible of diviſion according to *Haneefa*, but not according to the two diſciples; in the ſame manner as holds with reſpect to manumiſſion; for *Kitàbat* is in one ſhape a cauſe of manumiſſion. In the caſe in queſtion, therefore, the contract of *Kitàbat* takes effect with reſpect only to the ſhare of the contracting partner, (according to *Haneeſa*,) becauſe of its diviſibility,—the uſe of the other partner's aſſent being merely that by it his right of annulling the contract is relinquiſhed; (for if he were not to ſignify his aſſent, he might annul the contract.) Now the conſent of the other partner to the contracting partner's taking poſſeſſion of the ranſom, is a conſent to the ſlave's paying it. The aſſenting partner, therefore, acts voluntarily * with reſpect to his moiety in the ſlave's acquiſitions. Accordingly, the whole taken poſſeſſion of belongs to the contracting partner, and the aſſenting partner cannot afterwards deprive him of any part of it.

---

* Arab. *Teberrä*; literally, "*he does what he is not obliged to do*," (meaning, in this place, that he, for the preſent, ſurrenders his right.)—The tranſlator does not recollect any

OBJECTION.—It is a rule that a perſon who acts voluntarily is entitled to reſume what he may have voluntarily relinquiſhed, where the end of his voluntary act has not been anſwered;—as if, for inſtance, a perſon were voluntarily to advance the price of merchandize, and the merchandize ſhould afterwards periſh before he had obtained poſſeſſion of it, or it ſhould prove the right of ſome other perſon; in which caſe the voluntary agent is entitled to take back what he had paid; and ſo likewiſe in the caſe in queſtion, as the end, namely *Kitábat*, has been defeated, it would follow that the partner who voluntarily relinquiſhed his right is entitled to reſume what he had acted voluntarily with reſpect to.

REPLY.—In the caſe in queſtion the maſter has undoubtedly proceeded voluntarily with reſpect to the *Mokâtib*, who, upon failing in his engagement, again becomes an abſolute ſlave; but a maſter cannot claim a debt from his ſlave; and hence it is that the voluntary agent cannot, in the preſent inſtance, reſume what he had relinquiſhed.

—According to the two diſciples, on the contrary, an aſſent to the *Kitábat* of his partner's ſhare is, in fact, an aſſent to the *Kitábat* of the whole ſlave, as they hold *Kitábat* to be indiviſible. The contracting partner is therefore a principal with reſpect to one half, and an agent with reſpect to the other half: conſequently the ſlave is a *Mokâtib* to both; and as whatever, of his acquiſitions, may be received by the contracting partner, is equally participated between both, it

---

any *ſingle* Engliſh word which would convey the preciſe meaning, for which reaſon, and to avoid the obſcurity of a paraphraſtical tranſlation, he has, a little further on, rendered the participle from this root *voluntary agent*, a term which anſwers more exactly than any other to the idea of the author.

follows that it remains to be ſo participated after the ſlave has failed in the payment of his ranſom.

Caſe of a partnerſhip *Mokâtibâ*, bearing a child to her two maſters ſucceſſively.

If two men conſtitute their partnerſhip female ſlave a *Mokâtibâ*, and one of them afterwards cohabit with her, and ſhe bring forth a child, and the cohabiting partner claim it,—and the other partner afterwards cohabit with her, and ſhe bring forth another child, and this other partner claim that child, and the ſlave be afterwards unable to diſcharge her ranſom,—ſhe, in ſuch caſe, becomes an *Am-Walid* to the former partner. The reaſon of this is, that upon one of the two owners firſt claiming a child born of her, his claim was valid, becauſe of his right of property; and his ſhare became *Am-Walid* to him excluſively; for a *Mokâtibâ* is incapable of ſhifting from the property of one perſon to the property of another. Hence *his* ſhare alone became *Am-Walid**; (as in the caſe of a *Modabbirâ* held in partnerſhip between two; that is to ſay, if two perſons unite in granting a *Tadbeer* to their joint female ſlave, and one of them afterwards cohabit with her, and ſhe produce a child, and the cohabiting partner claim it,—in ſuch caſe the parentage of the child is eſtabliſhed in *this* partner, and *his* ſhare alone becomes *Am-Walid*;—and ſo likewiſe in the caſe in queſtion;)—and again, upon the other maſter claiming the ſecond child, his claim is alſo valid, as his right of property in the ſlave exiſts with regard to the appearance, becauſe of the endurance of the contract of *Kitàbat*. But upon the ſlave proving unable to diſcharge her ranſom, the contract of *Kitàbat* becomes the ſame as if it had never exiſted; and it then becomes evident that the ſlave is wholly an *Am-Walid*, becauſe the contract of *Kitàbat*, which was the obſtruction to her ſhifting from the property of one perſon to the property of another, is annulled. Conſequently, as the cohabitation of the former partner was prior in point of time, ſhe from that period becomes his *Am-Walid*;—and he is reſponſible to the other partner for half her value, as having become proprietor of that partner's ſhare, in virtue of the ſlave becoming wholly an *Am-Walid* to himſelf. In this caſe, alſo, an half *Akir* [fine of treſſpaſs] on account of the ſlave is incumbent on the *prior* cohabiting partner, becauſe of his having cohabited with a partnerſhip ſlave. The *latter* cohabiting partner, on the other hand, is reſponſible for an atonement to the amount of the *complete* fine; and he muſt alſo pay the other partner the value of the ſecond child, the parentage of which is eſtabliſhed in him; for he ſtands as a *Magroor*, as his right of property in the ſlave had an apparent exiſtence at the time of his connexion with her; and the parentage of a *Magroor*'s child is eſtabliſhed in the *Magroor*, and it is emancipated for the value, as has been repeatedly explained. As, however, it appears that this partner, in having ſuch connexion, has actually cohabited with the *Am-Walid* of another perſon, the *whole* fine is incumbent upon him, not an *half* fine. Either partner may, in this caſe, lawfully pay the fine to the *Mokâtibâ*; becauſe as long as the contract of *Kitâbat* continues in force, the right of taking poſſeſſion of it appertains to her, as ſhe is ſole [*] with reſpect to the uſe of her perſon, or the conſideration for ſuch uſe. But upon her proving unable to fulfil her part of the contract of *Kitâbat*, ſhe muſt account to the prior cohabiting partner for what ſhe has thus received, as it then becomes evident that *he* is ſole with reſpect to the uſe of her perſon. All this is according to *Haneefa*. The two diſciples allege that the ſlave, upon claim being laid to the firſt child, becomes wholly an *Am-Walid* to the firſt partner, and that it is, conſequently, utterly unlawful for the other partner to have afterwards any connexion with her; becauſe all authorities agree that it is incumbent to make maternity [†] complete, as far as may be practicable; and this is practicable in the preſent inſtance, by diſſolving the contract of *Kitàbat*, as it is capable of annulment.—The contract of *Kitàbat* is therefore diſſolved ſo far as is not injurious to the *Mokâtibá*, ſuch as her becoming an *Am-Walid*, and continues in force with reſpect to other points, ſuch as her excluſive right to her earnings, and to the earnings of her child.—(It is otherwiſe with reſpect to a *Modabbirá*; for the analogy conceived by *Haneefa* between a contract of *Kitàbat* and the act of granting a ſlave *Tadbeer* is not admitted, as between thoſe there is an eſſential difference, *Kitàbat* being capable of diſſolution, whereas *Tadbeer* is not ſo. It is alſo otherwiſe with reſpect to the ſale of a *Mokâtib*, as the contract of *Kitàbat* cannot be diſſolved from the neceſſity of the ſale, ſince this would be injurious to the *Mokâtib*;—in other words, if the ſale were valid, the contract of *Kitabat* would be null, ſince the purchaſer will not aſſent to the continuance of the contract of *Kitàbat*; and in caſe the *Kitàbat* were annulled, it would be injurious to the *Mokâtib*; and a *Kitàbat* is not annulled with reſpect to any thing which would be injurious to the *Mokâtib*.)—It is alſo to be obſerved, that as the *Mokâtibá* became wholly *Am-Walid* to the firſt partner, it neceſſarily follows that the ſecond partner, in afterwards cohabiting with her, had connexion with the *Am-Walid* of another. Hence the parentage of the ſecond child is not eſtabliſhed in him, nor is it emancipated for the value. The ſecond partner, however, is not liable to puniſhment, becauſe of a demur; but he is liable to an *Akir*, or fine of treſpaſs, ſince, in conſequence of his commiſſion of the carnal act, either fine or puniſhment is unavoidably incurred, and as the latter is remitted, the former is conſequently due from him. With reſpect to the obligations to which the *Mokâtibá* is ſubject in this inſtance, there is a difference of opinion. Some ſay that a moiety of the ranſom is incumbent upon her; becauſe the contract was annulled only ſo far as might not be injurious to her, and in conſequence of remitting her half the ranſom ſhe ſuſtains no injury. Some, on the other hand, maintain that the *whole* ranſom is incumbent upon her; becauſe the contract in queſtion was not annulled except merely with reſpect to maſterſhip, in order that the firſt partner may become proprietor, and that ſhe may in conſequence become his *Am-Walid*; (that is to ſay, the contract is annulled purely from this neceſſity;) and hence the effect of annulment will not appear in regard to remitting a moiety of the ranſom. It is alſo to be obſerved, that the fine on account of the *Mokâtibá* is to be paid to her, as ſhe is excluſively entitled to the conſideration for the uſe of her perſon. If, however, ſhe afterwards prove incapable of paying her ranſom, and become again an abſolute property, ſhe muſt pay the ſaid fine to the firſt partner, as it then becomes evident that *he* is excluſively entitled to the conſideration for the uſe of her perſon. It is alſo to be obſerved, that in this caſe the firſt partner owes a compenſation to the other for half the value of the ſlave as a *Mokâtibá*, (judging from the opinion of *Aboo Yooſaf*;) ſince he [the firſt partner] has become proprietor of her at a time when ſhe has become a *Mokâtibá*. He therefore is thus reſponſible, whether he be rich or poor, as this is a *Zimân Timallook*, or *recompence for an aſſumption of property*, becauſe all the effects of right of property are obtained, with reſpect to the ſlave, ſuch as the legality of generation, right of ſervice, and ſo forth. According to the opinion of *Mohammed*, the firſt partner is reſponſible to the ſecond for whatever is the ſmalleſt of the two,—the half value of the *Mokâtibá*, or the half of what remains unpaid of the ranſom; becauſe his partner's right extends to the half of the ſlave's perſon, if ſhe be incapable of diſcharging her ranſom, or to the half of the ranſom if ſhe diſcharge it. As, therefore, his right embraces two objects, he is entitled to that one of them which is the ſmalleſt.

---

* That is to ſay, the property or quality of being an *Am-Walid* was reſtricted *excluſively* to his ſhare, and was not imparted in any reſpect to the ſhare of his co-partner. (This is the literal ſenſe of the paſſage as it occurs in the *Arabic* verſion.)

---

[*] Meaning, "*ſhe has excluſive privilege with reſpect to the diſpoſal of.*"

[†] Arab. *Amoomeeat*, from *Am*, [mother.]—*Am-Walid* literally means *mother of a child.* Conſequently *Amoomeeat al Walid* ſignifies *the ſtate of being mother to a child.*

Caſe of a partnerſhip *Mokâtibá* bearing a child to one maſter, and created a *Modabbirá* by the other.

IN the caſe above ſtated, if the ſecond partner ſhould not have connexion with the *Mokâtibá*, but create his ſhare of her *Modabbirá*, and ſhe be afterwards unable to pay her ranſom, the *Tadbeer* he has thus granted to her is null, as it now appears that he has not conſtituted *his own* property *Modabbirá*, but the property of the firſt partner.—This, according to the two diſciples, is evident; becauſe (as they maintain) the firſt partner became proprietor of her *in toto*, in conſequence of making her an *Am-Walid*, before her incapacity to pay the ranſom appeared. It is alſo evident, according to *Haneefa*, becauſe (as he maintains) in conſequence of her incapacity to pay her ranſom, it appears that the firſt partner has become proprietor of the ſecond partner's ſhare from the period of cohabitation, and it thence appears that he [the ſecond partner] created *Modabbirá* what was not his own property; and the validity of *Tadbeer* reſts upon right of property:—contrary to the *eſtabliſhment of parentage*, the validity of that reſting upon *affinity*, as has been explained in its proper place. It is alſo to be obſerved, that the ſlave in queſtion, in caſe of the ſecond partner not having connexion with her, but creating his ſhare of her a *Modabbirá*, is an *Am-Walid* to the firſt partner, as he has become proprietor of the other partner's ſhare; and ſhe is completely and entirely ſo, becauſe of what was already ſaid, that "all authorities agree that "it is incumbent to make maternity complete." The firſt partner is reſponſible to the ſecond for a moiety of the *Akir*, or fine of treſpaſs, as having had connexion with a partnerſhip ſlave; and he is alſo reſponſible for half her value, as having become proprietor of his half, in virtue of *Iſteelâd*, which requires that he become proprietor for the value. The child born of the ſlave, moreover, appertains to the firſt partner, as his claim to it is valid, the occaſion of ſuch validity (namely, right of property) exiſting in the ſlave. This is the opinion of all our doctors, on the grounds which have been before explained.

Caſe of a partnerſhip *Mokâtibá* emancipated by one of her maſters.

If two maſters create their partnerſhip ſlave a *Mokâtibá*, and one of them, being wealthy, afterwards emancipate her, and ſhe, after that, prove unable to pay her ranſom, in this caſe the emancipator is reſponſible for half her value, for which ſhe then becomes reſponſible to him*. This is according to *Haneefa*. The two diſciples maintain

---

* That is to ſay, which ſhe is accountable for to him, and muſt diſcharge by emancipatory labour, before ſhe can obtain complete liberty.

that

that ſhe is not reſponſible to him for ſuch half, becauſe, in conſequence of her incapacity to pay her ranſom, ſhe again becomes an abſolute ſlave, and is the ſame, in fact, as if ſhe had never been any thing elſe.—In the inſtance, alſo, of one of two partners emancipating his ſhare of a partnerſhip ſlave, there is a difference of opinion concerning the recovery of the compenſation;—for, according to *Haneefa*, the non-emancipating partner has in this caſe three things at his option;—he may either emancipate his ſhare, or require emancipatory labour on account of it from the ſlave, or take a compenſation for the value of it from his partner;—whereas, according to the two diſciples, he muſt take a compenſation from his partner for the value, if he be rich, or if he be poor he muſt require emancipatory labour from the ſlave.—There is alſo, in this inſtance, a difference with reſpect to the *Willa*, or right of inheriting to the ſlave; for this, according to *Haneefa*, belongs to both partners, in proportion to their reſpective ſhares, provided the other partner alſo emancipate his ſhare, or require emancipatory labour,—or, it belongs excluſively to the emancipating partner, if the *non*-emancipator take from him a compenſation for the value of his ſhare;—whereas, according to the two diſciples, the *Willa* belongs to the emancipator, excluſively, at all events. The difference of opinion upon theſe three points is occaſioned by the difference between our doctors concerning the diviſibility of manumiſſion, as already ſet forth under its proper head.—What is above advanced proceeds on the ſuppoſition of the ſlave being unable to pay her ranſom; for before her incapacity becomes apparent, the non-emancipating partner cannot take a compenſation from the emancipator, according to *Haneefa*, becauſe as (agreeably to his tenets) manumiſſion is diviſible, the effect of his emancipation of a part is merely to render the ſhare of the non-emancipator like a *Mokâtib*; and as the ſlave is already a *Mokâtibâ*, it follows that no change is wrought in that ſhare by ſuch manumiſſion. According to the two diſciples, on the contrary, as manumiſſion (agreeably to their tenets) is indiviſible, the whole ſlave becomes free, whence the non-emancipating partner is entitled to take a compenſation from the emancipator for the value of his ſhare, provided he be rich,—or, if he be poor, to require emancipatory labour from the ſlave;—for as this is a caſe of *recompence for manumiſſion*, the wealth or poverty of the emancipator occaſions a difference.

Caſe of one of two maſters creating his ſhare in a ſlave *Modabbir*, and the other then emancipating his ſhare.

If one of two maſters conſtitute his ſhare in a ſlave *Modabbir*, and the other maſter, being wealthy, afterwards emancipate his ſhare, in this caſe the former has it at his option either to take a compenſation from the emancipator for half the value of the ſlave, as a *Modabbir*, or to require emancipatory labour from the ſlave, or, laſtly, to emancipate him gratis. If, on the contrary, one partner firſt emancipate his ſhare, and the other then conſtitute his ſhare *Modabbir*, this partner cannot take any compenſation from the emancipator,—but he may either require emancipatory labour from the ſlave, or may emancipate him gratis *. With reſpect to the *Modabbir* value of the ſlave, ſome ſay that it is to be eſtabliſhed by appraizers.—Others, again, contend that it is two thirds of the value as an abſolute ſlave; and this is approved; becauſe the advantages derived from a ſlave are of three kinds or deſcriptions,—firſt, *ſale*, and the like,—ſecondly, *ſervice*, and the like,—and thirdly, *manumiſſion*, and the like;—and as one of theſe is done away by *Tadbeer*, (namely, *ſale* and the like,) it follows that one third of the value drops.—It is proper to remark, that upon the emancipator paying the *Tadbeer* partner a compenſation, ſtill he does not, in conſequence, become proprietor of that portion of the ſlave for which he pays ſuch compenſation; for a *Modabbir* cannot ſhift from the property of one perſon to the property of another;—as where, for inſtance, a perſon uſurps the *Modabbir* of another, and he [the *Modabbir*] abſconds, and the uſurper pays the owner a compenſation; in which caſe he does not become proprietor of the *Modabbir*, but upon his being taken and brought back, is only at liberty to require emancipatory labour from him.—If one of the two maſters firſt emancipate the ſlave in queſtion, the other has three things at his option, according to *Haneefa:* and if he create his ſhare a *Moddabir*, his option of taking compenſation diſcontinues, but he has ſtill an option of emancipating the ſlave, or requiring emancipatory labour from him, as a *Modabbir* is capable of either being emancipated or having emancipatory labour required from him.—*Aboo Yooſaf* and *Mohammed* have ſaid that if one of the two maſters firſt conſtitute his ſhare in the ſlave *Mokâtib*, the emancipation by the other partner would be null; becauſe as (according to them) *Tadbeer* is indiviſible, the partner who grants it thereby becomes proprietor of the other partner's ſhare, and muſt make a compenſation to him for half the value, whether he be rich or poor, as this is a *Zimân Timâllook*, or *recompence for aſſumption of property*, the obligation of which is not affected by the wealth or poverty of him who is reſponſible for it.—He muſt, moreover, make this compenſation for half the value at the rate of an *abſolute* ſlave, as the ſlave whom he has conſtituted *Modabbir* is an *abſolute* ſlave.—If, on the contrary, one of the two partners firſt emancipate his ſhare, *Tadbeer* by the other partner would be null; becauſe (according to them) manumiſſion is indiviſible; whence the ſlave is emancipated *in toto*, and therefore the point upon which the validity of *Tadbeer* reſts does not here exiſt.—And in this caſe the emancipator is reſponſible for half the value of the ſlave, provided he be wealthy; or, if he be poor, the ſlave muſt perform emancipatory labour for half his value,—becauſe this is a *Zimân Ittâk*, or *recompence for manumiſſion*, the nature of which is different, according to the emancipator's circumſtances.

---

* A ſmall portion of the text, explaining the principles upon which *Haneefa* proceeds in this inſtance, is here omitted, as it is exceedingly trifling, and ſomewhat obſcure, and the ſubſtance of it has already been explained in treating of the manumiſſion of partnerſhip ſlaves.

CHAP.

CHAP. VI.

Of the Death or Inſolvency* of the *Mokâtib*; and of the Death of his Maſter.

A *Mokâtib* failing in his payments, muſt (if he appear on enquiry to be ſolvent) be indulged with a ſhort delay:

Upon a *Mokâtib* failing to make good the ſtated payments ſtipulated†, the magiſtrate muſt examine into his circumſtances; and in caſe he find that there are recoverable debts owing to the *Mokâtib*, or that he has property in another perſon's hands, which is likely to be reſtored, he muſt not precipitate his decree of inability, but muſt wait for two or three days, out of tenderneſs to both parties,—to the maſter, in order that he may get the ranſom, and to the ſlave, in order that he may obtain his liberty.—The time of waiting is fixed at three days, becauſe this is the time granted for making experiment of the truth of pretexts,—as in the delay allowed to a defendant, for the purpoſe of accommodation,—or to a debtor, for the purpoſe of paying his debts:—hence the time of waiting muſt not exceed that term.—If, on the contrary, the *Mokâtib* have nothing whatever, and the maſter require the magiſtrate to paſs a decree of inability, he muſt accordingly paſs ſuch decree forthwith, and diſſolve the contract of *Kitàbat*.—This is according to *Haneefa* and *Mohammed*.—*Aboo Yooſaf* maintains that the magiſtrate muſt not paſs a decree until ſuch time as the *Mokâtib* ſhall have failed in two payments ſucceſſively, becauſe of a ſaying of *Alee*, "*Upon the* MOKÂTIB *falling in arrear two payments,* "*ſucceſſively, let him revert to his original ſtate of an abſolute ſlave,*" as from hence it may be inferred that he does not revert to a ſtate of abſolute bondage as long as he does not fail in two payments; ſince, as the prophet's ſucceſſor here ſuſpends his ſo doing upon that circumſtance, it cannot happen until that circumſtance takes place. Beſides, a contract of *Kitàbat* is a contract of friendſhip and benevolence, whence it is moſt laudable that a prompt performance be not inſiſted on in it.—The time for payment, moreover, is *after* the arrival of the period appointed;—(in other words, upon the term of credit expiring, payment becomes due; but the contract is not diſſolved until after the lapſe of ſuch a time as may afford an opportunity to provide money for the payment;)—and it is therefore indiſpenſably requiſite that, after the expiration of the term of credit, a delay be granted of ſuch a time as may ſerve for experiment, and enable the ſlave to make payment;—and the moſt approved time of ſuch delay is the time agreed upon by the contracting parties, namely, the term of the ſecond payment. As ſoon, therefore, as the term of credit of the ſecond payment is expired, if the ſlave have not paid, his inability to pay becomes eſtabliſhed, becauſe of the lapſe of the term of delay agreed upon by the contracting parties.—The argument of *Haneefa* and *Mohammed* is that the cauſe of annulment, namely, inability to pay, is already fully eſtabliſhed, ſince a perſon who is incapable of making good *one* payment is certainly incapable of making good *two*.—Beſides, the deſign of the maſter is to obtain poſſeſſion of the property at the expiration of the term of credit; and as this deſign is not anſwered, it follows that the contract of *Kitàbat* is diſſolved, unleſs he aſſent to a farther delay. This reaſoning, however, does not hold with reſpect to a forbearance for two or three days, as that is indiſpenſably requiſite to enable the *Mokâtib* to make good his payment: this, therefore, is not accounted a delay. With reſpect to the dependance placed by *Aboo Yooſaf* upon the ſaying of *Alee*, it may be replied that traditions differ upon the point in queſtion; for it is related that *Omar*, upon his *Mokâtibâ* proving unable to make good one payment of her ranſom, remanded her to her original ſtate of abſolute bondage;—and where caſes in point thus eſſentially differ, no poſitive inference can be drawn from them.

---

* Meaning, "his inability to complete the payment of his ranſom."

† The ranſom or conſideration for *Kitàbat* is generally ſtipulated to be paid by the ſlave in ſeparate *Kiſts*, or *lots*, at appointed times, which are here termed by the tranſlator, the *payments*.

but the *Kitàbat* may be diſſolved by his conſent *without* ſuch delay;

If there be a failure of payment ſubmitted to the deciſion of ſome other than the *Kâzee*, or other public magiſtrate, and the *Mokâtib* ſlave prove unable to make good his engagement, and his maſter accordingly reduce him again to the ſtate of an abſolute ſlave, with his [the ſlave's] conſent, it is lawful, becauſe as the contract of *Kitàbat* might be diſſolved by his conſent, without any pretext, it may conſequently be ſo diſſolved where a pretext actually exiſts *a fortiori*.—If, however, the ſlave be not aſſenting, a decree of the *Kâzee* is indiſpenſably requiſite to annul the contract of *Kitàbat*; becauſe as it is complete and binding, a decree of the *Kâzee*, or the aſſent of the parties, is therefore requiſite to its diſſolution;—in the ſame manner as holds with reſpect to a reſtitution of merchandize, after ſeizin, in conſequence of a defect.

and upon the *Kitàbat* being diſſolved, the bondage completely reverts.

Upon a *Mokâtib* becoming incapable of paying his ranſom, all the effects of bondage revert, in conſequence of the diſſolution of the contract of *Kitàbat*.—In this caſe, alſo, all the earnings of the *Mokâtib*, then in his poſſeſſion, belong to his maſter, as they then appear to be the acquiſitions of his ſlave. The ground of this is, that the right of property in thoſe acquiſitions was ſuſpended; for if the *Mokâtib* had duly paid his ranſom they would have belonged to him, whereas failing this, they belong to his maſter;—and upon the inability becoming evident, the ſuſpence diſcontinues, and the earnings belong to the maſter accordingly.

Decree to be iſſued on the death of an inſolvent *Mokàtib*.

If a *Mokâtib* die, leaving effects ſufficient to diſcharge his ranſom, the contract of *Kitàbat* is not diſſolved; but a decree is paſſed, directing that " every thing owing by the *Mokâtib* ſhall be paid out of his " eſtate,—(that) he is free upon the laſt inſtant of his life,—and " (that, conſequently) what remains, after paying the ranſom, ſhall " go

Digitized by Google

" go to his heirs, and his children are free."—This is the doctrine of *Alee* and *Ibn Maſaood*; and our doctors have always acted in conformity with it.—*Shafeï* maintains that the contract of *Kitàbat* becomes null, and the *Mokâtib* dies an abſolute ſlave. The effects, alſo, left by him belong to his maſter; becauſe *Zeyd Binſabit* has ſaid, " a contract of " *Kitàbat* is annulled by the deceaſe of the *Mokâtib*;" and alſo, becauſe the deſign of a contract of *Kitàbat* is the emancipation of the *Mokâtib*, and as the accompliſhment of this end has become impracticable, the contract is conſequently null. The ground of this is that, even admitting freedom to be eſtabliſhed, ſtill it is not exempt from one of three conſtructions; for it is either eſtabliſhed *after* death, as happening in conſequence of that event,—or *before* death,—or, laſtly, *after* death, in the manner of a ſucceſſion. Now on all theſe ſuppoſitions it is a mere nullity:—in the firſt, becauſe, in conſequence of having died, he no longer remains capable of being emancipated;—and, in the ſecond, becauſe the condition of his freedom (namely, the payment of a ranſom) has not taken place;—and, in the third, becauſe a thing is firſt eſtabliſhed and then ſucceeded to,—but here the eſtabliſhment of the *Mokâtib*'s freedom *a priori* is impoſſible. The argument of our doctors is, that a contract of *Kitàbat* is a contract of exchange; and as it therefore would not be rendered null by the deceaſe of *one* of the contracting parties, namely the maſter, ſince the continuance of ſuch a contract is both convenient and requiſite, for the ſake of giving life to the maſter's right,—it follows, in the ſame manner, that it is not annulled by the deceaſe of the other contracting party, namely the *Mokâtib*, ſince the continuance of the contract is requiſite for giving life to his right *a fortiori*, his right being of a ſtill more forcible nature than the right of his maſter, inſomuch that the contract is binding on the part of the maſter, as he cannot of himſelf annul it on account of the right of the ſlave,—whereas it is not binding on the part of the ſlave, as he has it in his power to annul it of himſelf.—It is to be obſerved, that ſome of the learned hold the ſlave to become free after death, in this way, that he is ſtill ſuppoſed virtually to live in his contract. Moſt lawyers, however, maintain that he is free upon the laſt inſtant of his life, in the manner of a ſucceſſion, and in this way, that the cauſe of his freedom, namely the diſcharge of his ranſom, is referred to a time antecedent to his death; and that therefore the payment of the ranſom by the heir of the *Mokâtib* (namely his ſucceſſor) is equivalent to payment by himſelf;—and all this is poſſible; as is explained at large in the *Khilâſeeyât* *.

A *Mokâtib* dying inſolvent, and leaving a child born in *Kitâbat*, the child muſt perform labour to the value of his ranſom.

If a *Mokâtib* die without leaving property ſufficient to diſcharge his ranſom, but leave a child, who was born during the exiſtence of the contract, this child is to perform emancipatory labour for the diſcharge of its father's ranſom, to a degree equivalent to the payments ſtipulated by the father,—and upon the child ſo doing, a decree muſt be paſſed, declaring the father to have been free before death; and the child himſelf becomes free, as having been included in the father's contract of *Kitâbat*;—for as, in this inſtance, the earnings of the child are the ſame as the earnings of the *Mokâtib*, it follows that payment made by the child is equivalent to payment by the father; and the caſe is conſequently the ſame as if the *Mokâtib* had left behind him property ſufficient for the diſcharge of his ranſom.

If the *Mokâtib* had *purchaſed* his child, the child muſt diſcharge the ranſom, or become a ſlave.

If a *Mokâtib* die, without leaving property ſufficient to diſcharge his ranſom, but leave his child, whom he had purchaſed † during the exiſtence of the contract, this child is to be informed that "he muſt "either *now* pay the father's ranſom, or himſelf become an abſolute "ſlave."—This is according to *Haneefa.*—According to the two diſciples, the child is to diſcharge the ranſom agreeably to the payments

---

* An *Arabic* law-treatiſe ſo termed.

† This ſuppoſes his child to have been a ſlave to ſome other perſon, (not the maſter of the *Mokâtib*,) and that the *Mokâtib* has purchaſed him from that perſon with a view to his future freedom, which muſt take place upon the *Mokâtib* himſelf becoming free.

Digitized by Google

and times of payment ſtipulated by the father; becauſe ſuch is the rule with reſpect to a child *born* during the exiſtence of the contract, on account of that child being a *Mokâtib* in dependance from the father, and the ſame reaſon holds with reſpect to a child *purchaſed* during the exiſtence of the contract,—whence it is that the maſter is at liberty to *emancipate* ſuch child (in oppoſition to any *other* acquiſitions of the *Mokâtib*, as over theſe the maſter has no power:)—the *purchaſed* child, therefore, is ſubject to the ſame rule, in this particular, with the child born during the exiſtence of the contract. The argument of *Haneefa* upon this point is that there is a material difference between the caſes;—becauſe, as the different payments and times of payment are eſtabliſhed by the ſtipulations in the contract, they are eſtabliſhed with reſpect only to any perſon included in it; but the *purchaſed* child is not included in the contract, as to him it has no reference:—the terms of the contract, therefore, do not extend to or reach him, becauſe of hi being diſtinct. It is otherwiſe with reſpect to a child *born* during the contract, as he was conjunct at the time of the exiſtence of *Kitàbat*, and conſequently the terms of the contract extend to him;—and as he is thus included in the terms of it, he therefore muſt perform emancipatory labour agreeably to the payment ſtipulated in it.

If he die ſolvent, the child is free and his heir.

IF a *Mokâtib* purchaſe his child, and then die, leaving property ſufficient to diſcharge his ranſom, the child is his heir;—becauſe, upon a decree being iſſued, declaring the *Mokâtib* to be free on the laſt inſtant of his exiſtence, a decree muſt alſo iſſue, declaring the child likewiſe to be free at that time, as being a dependant of the father with reſpect to *Kitàbat*.—The child therefore is free, and the heir of a freeman.—In the ſame manner alſo, the child is free in a caſe where father and child have both become *Mokâtibs* under one contract, and the father dies, leaving property ſufficient to diſcharge the ranſom;—becauſe the child, if an infant, is a dependant of the father,—or if an adult, they are both regarded as one perſon, becauſe of the unity of the contract. Upon a decree, therefore, being iſſued, declaring the freedom of the father, a decree is alſo iſſued, declaring the freedom of the child at the ſame time.

Caſe of a murder committed by the child of a deceaſed *Mokâtib* begot upon a freedwoman.

If a *Mokâtib* die, leaving a child, born to him of a freed-woman, together with debts owing to him by different perſons ſufficient to diſcharge his ranſom, and the child afterwards commit a murder, and a fine of blood be decreed againſt the *Akilás* of the mother, this does not amount to a decree of inſolvency againſt the *Mokâtib*; becauſe in conſequence of ſuch decree the effect of the *Kitàbat* is rather confirmed and eſtabliſhed; (for the contract requires that the child of the *Mokâtib* be annexed to the *Mawlas*, or patrons of the mother, and that the fine be levied upon them, ſince they are her tribe *,—in this way, however, that there was a poſſibility that the father might have become free, and might conſequently have drawn over the *Willa* right with reſpect to the child to his own patrons;)—and the *Kázee* decreeing any thing which tends to eſtabliſh and confirm the effect of the *Kitàbat*, does not amount to a decree of inſolvency againſt the *Mokâtib*. If, on the contrary, the *Mawlas* of the mother litigate the right of *Willa* in regard to the child with the *Mawlas* of the father, and the *Kázee* decree in favour of the mother's *Mawlas*, this is an adjudication of the *Mokâtib*'s inſolvency; becauſe in this inſtance the difference between the *Mawlas* is not merely incidental, but is brought forward on its own grounds, and reſts upon the endurance or diſſolution of the contract of *Kitàbat*; for if the contract be diſſolved, the *Mokâtib* dies a ſlave, and the *Willa* of the child goes of courſe to the *Mawlas* of the mother; and if, on the other hand, the contract continue in force, and the payment of the ranſom be connected with it, the *Mokâtib* dies a freedman, and the *Willa* of the child ſhifts to the *Mawlas* of the father.—Now, concerning the *Mokâtib*'s being free or otherwiſe, there is a difference of opinion among the companions.—Hence whatever the *Kâzee* may decree takes effect; and accordingly, in this laſt inſtance, his decree is a decree of inſolvency.

---

* "They are her *Akilás*."—(See *Moàkil*.) This caſe cannot be fully comprehended without a reference to the laws of *Deyit*, *Moàkil*, and *Willa*.

An alms received by a *Mokâtib*, and made over to his maſter, is lawful to the latter in caſe of the *Mokâtib*'s inſolvency.

If a perſon beſtow any thing upon a *Mokâtib* by way of alms*, and he give the ſame to his wealthy maſter as part of his ranſom, and be afterwards incapable of completely diſcharging the ranſom, that thing is perfectly lawful to the maſter; becauſe the right of property in it has undergone an alteration, as the ſlave had become proprietor of it as an alms, and the maſter has become ſo as a conſideration for manumiſſion;—which is manifeſted by the words of the prophet, ſpeaking of *Bareerá*, "*This is an* ALMS *to him, but to me it is a* GIFT-OFFERING."—It is different where a *Mokâtib* gives his rich maſter, or a *Hâſhimee*, liberty to uſe or diſpoſe of *victuals*† which have come to him as an alms; for they cannot lawfully eat thoſe victuals, becauſe as they are the property of the perſon who gave a liberty with reſpect to them, it follows that theſe perſons, in eating them, would eat the property of another, as the right of property in the victuals has not undergone any alteration.—Correſpondent to this is a caſe where a perſon purchaſes an article by an invalid purchaſe, and then gives another a liberty with reſpect to it,—for ſtill the article is not lawful to this other,—whereas if he were to make a formal *conveyance* of the article to him, it would be lawful.—What is here advanced proceeds on a ſuppoſition of the *Mokâtib* proving unable to pay his ranſom, after having given his maſter the article in queſtion as a part of it.—If, on the contrary, he be inſolvent *before* he have ſo given it, in this caſe alſo the ſame rule obtains, (according to the *Rawâyet Saheeh*;)—in other words, the article is lawful to the maſter.—This, according to *Mohammed*, is evident, becauſe (agreeably to his tenets) by the inſolvency of the *Mokâtib* an alteration is wrought in the right of property, ſince upon this appearing, the maſter becomes proprietor of his acquiſitions, by a new right:—and it is alſo evident, according to *Aboo Yooſaf*, notwithſtanding the maſter's right of property be eſtabliſhed by the *Mokâtib*'s inſolvency;—the reaſon, however, according to him, is that the baſeneſs does not exiſt in the *alms*, but in the act of the *taker*, who incurs a degradation, which it is not lawful for a wealthy perſon to ſubject himſelf to without neceſſity,—nor for a *Hâſhimee*, becauſe of his ſuperior rank:—now the maſter is not found in the act of *taking*, and he therefore reſembles a pilgrim or traveller who arrives at his own country, or a pauper who becomes wealthy,—and in whoſe hands there ſtill remains a part of the alms they had received; for ſuch remaining part is lawful to them; and, on the ſame principle, if a *Mokâtib* become free, and acquire wealth, ſtill any thing remaining to him of the alms he may have received is lawful to him.

---

* It is common to beſtow alms upon ſlaves, with a view to enable them to purchaſe their freedom; and a portion of the *Zakât*, or public alms levied by government, is allotted to them for this purpoſe. (See Vol. I. p. 53.)

† Literally, "renders *free* [*Mobah*] to his rich maſter, or a *Hâſhimee*, victuals, &c." The point upon which the reaſoning here turns is the diſtinction between merely giving a perſon permiſſion to do as he likes with an article, and making it over to him by a formal conveyance and inveſtiture.

Caſe of an offence committed by a ſlave, who is afterwards made *Mokâtib* by his maſter.

If a ſlave commit an offence, and his maſter, not being informed of this, create him a *Mokâtib*, and he [the *Mokâtib*] prove inſolvent, the maſter muſt in this caſe either part with him, in recompence for the offence, or pay an atonement for it; ſuch being the original rule in offences committed by ſlaves. The maſter, moreover, was not aware of his offence during the exiſtence of *Kitâbat*, ſo as to embrace the option of paying the atonement; and at any rate, the *Kitàbat* would at that ſeaſon have deprived him of the alternative, as it would have prevented him from parting with the offender: but upon the *Kitàbat* failing the original rule reverts. In the ſame manner alſo, if a *Mokâtib* commit an offence, and the *Kâzee* neglect to decree a fine for the offence until ſuch time as he [the *Mokatib*] proves inſolvent, the maſter muſt in that caſe either part with him, or pay an atonement;

Digitized by Google

ment; for upon the *Kitàbat*, which was the obſtacle to parting with him, failing, the original rule reverts, as above mentioned.—If, on the other hand, the *Kâzee* had decreed a fine for the offence whilſt the ſlave was a *Mokâtib*, and he [the ſlave] afterwards prove inſolvent, it [the fine] is in that caſe a debt upon him, for the diſcharge of which he muſt be ſold; becauſe the right of the avenger of the offence in queſtion to the ſlave's perſon ſhifts to his value, in conſequence of the *Kâzee*'s decree. This is the doctrine of *Haneefa* and *Mohammed*; and *Aboo Yooſaf* alſo laterally adopted it. He [*Aboo Yooſaf*] had before held it a maxim that the ſlave ſhould be ſold on account of the fine, notwithſtanding he were to prove inſolvent antecedent to the *Kâzee*'s decree; (and ſuch is the opinion of *Ziffer*;) becauſe, as the obſtacle to the maſter parting with him (namely, *Kitàbat*) is eſtabliſhed and extant at the time of offence, it follows that upon the occurrence of the offence at that time, the value of the ſlave becomes due;—in the ſame manner as holds with reſpect to a *Modabbir* or *Am-Walid*; that is to ſay, if a *Modabbir* or *Am-Walid* commit an offence, their value is due, ſo likewiſe in the preſent inſtance. The argument of *Haneefa* and *Mohammed* is, that the obſtacle is capable of failure, ſince it is poſſible that the *Mokâtib* may prove inſolvent, and conſequently become again an abſolute ſlave. As, moreover, the right of the avenger of offence does not ſhift to his value on the inſtant, it therefore remains ſuſpended upon a decree of the *Kâzee*;—in the ſame manner as where a purchaſed ſlave abſconds before the purchaſer has taken poſſeſſion of him; in which caſe the diſſolution of the ſale depends upon a decree of the *Kâzee*, as it is ſtill poſſible that the ſlave may return.—It is otherwiſe with reſpect to a *Modabbir* or *Am-Walid*, as *Iſteelâd* is incapable of failure or diſſolution, under any circumſtance whatever.

A contract of *Kitàbat* is not diſſolved by the death of the maſter.

IF the maſter of a *Mokâtib* die, the contract of *Kitàbat* is not diſſolved, in order that the right of the *Mokâtib* may not be annulled; for *Kitàbat* operates as a cauſe of freedom, and freedom is the right of the *Mokâtib*;—and as, whatever is the right of a perſon, the cauſe thereof is alſo his right, it follows that the *Kitàbat* is the right of the *Mokâtib*.—Now a right is not annulled by death, in the ſame manner as a debt owing from any perſon is not annulled by the death of that perſon.—The contract of *Kitàbat*, therefore, is not diſſolved: but the *Mokâtib* muſt be told to account for his ranſom to the heirs of the deceaſed, agreeably to the payments engaged for in the contract; becauſe, as that is the mode in which he is entitled to freedom, and as the cauſe of his freedom has alſo been thus preſcribed, it conſequently continues ſo without any alteration.—It is to be obſerved, however, that the maſter's heirs are his ſubſtitutes with reſpect only to receiving or exacting payment of the ranſom.—If, therefore, one of them emancipate his ſhare in the *Mokâtib* gratis, ſtill his manumiſſion does not take effect, as he has not become a *proprietor* of that ſhare, a *Mokâtib* not being a ſubject of inheritance.—The ground of this is that as a *Mokâtib* cannot become a property in virtue of any *other* cauſes of right of property, (ſuch as *ſale*, *gift*, and ſo forth,) ſo neither can he in virtue of inheritance. If, however, all the heirs unite in emancipating the *Mokâtib*, he is free; becauſe his ranſom is in this caſe remitted; for the manumiſſion exempts him from it, as it is the right of the heirs, and ranſom is a ſubject of inheritance;—and upon the ranſom being remitted, he becomes free of courſe,—in the ſame manner as where a maſter exempts his *Mokâtib* from ranſom.—Where, on the contrary, emancipation is granted by only *one* of the heirs, an exemption from his ſhare [of ranſom] is not eſtabliſhed; becauſe the manumiſſion above deſcribed is rendered an exemption, in the manner of an eſſential requiſite, or thing taken for granted, in order that the freedom of the *Mokâtib* may be valid and effectual. Now manumiſſion is not eſtabliſhed by a partial exemption, or a partial payment, with reſpect either to the *whole* or to a *part* of the *Mokâtib*; and conſequently the exemption cannot be eſtabliſhed; becauſe where *that which requires* (namely, manumiſſion) does not appear, *that which is required* (namely, exemption) cannot be eſtabliſhed;—and if, on the other hand, the *Mokâtib* were exempted from the *whole* of the ranſom, in conſequence of emancipation by a part of the heirs, it would be abſurd, becauſe the right of the other heirs is connected with it.

HEDAYA.

BOOK XXXIII.

Of WILLA*.

Definition of the term.

WILLA literally means aſſiſtance and friendſhip. In the language of the LAW it ſignifies (according to the expoſition in the *Indyat*) that mutual aſſiſtance which is a cauſe of inheritance.

Willa is of two deſcriptions, *Ittakit*

WILLA is of two ſpecies or deſcriptions. I. *Willa Ittàkit* †, (which is alſo termed *Willa Niàmit* ‡,) the occaſion of which is manu-

---

* There is no ſingle word in our language fully expreſſive of this term. The ſhorteſt definition of it is "*the relation between the maſter* (or patron) *and his freedman*;" but even this does not expreſs the whole meaning.

† The *Willa* of *manumiſſion*.

‡ The *Willa* of *beneficence*, or of *favour*.

miſſion,

Digitized by Google

miſſion from right of property, (according to the *Rawâyet-Saheeh*,) whence it is that if a perſon become proprietor of his kinſman by inheritance, ſuch kinſman is free, and his *Willa* goes to that perſon.—II. *Willa Mawalât* *, the occaſion of which is a contract of *Mawalât*, [*mutual* amity—or patronage and clientage,] as ſhall be explained in its proper place.—The occaſion of the firſt ſpecies, therefore, being manumiſſion, and of the ſecond, a contract of mutual amity, they are termed the WILLA *of manumiſſion*, or the WILLA *of mutual amity*, by a reference of the effect to the cauſe. Both ſpecies, moreover, bear the characteriſtic of *aſſiſtance:*—and as the *Arabs* were accuſtomed to aſſiſt each other in various ways, and the prophet interpreted ſuch mutual aſſiſtance into *Willa* of both ſpecies, he uſed to ſay of them, indiſcriminately, "*They have* WILLA *people among them*," and alſo, "*They have* HALEEFS [ſworn confederates] *among them*;" by which laſt is underſtood the relation of *Mâwla Mawalât*, as the *Arabs* were accuſtomed to confirm their contracts of *Mawalât*, or mutual amity, by oaths.

and *Mawalât*.

The *Willa* of a ſlave appertains to his emancipator, rendering him liable to fines incurred by the ſlave,

If a maſter emancipate his ſlave, the *Willa* of ſuch ſlave appertains to him;—becauſe the prophet has ſaid, "*The* WILLA *of a ſlave belongs to the perſon who emancipates him*;" and alſo, becauſe † [two conſequences ariſe from manumiſſion; I. Liability to the *Deyit*, or fine of blood,—the cauſe of which liability is *aſſiſtance*, exhibited and ob-

---

* The *Willa* of *mutual amity*, or of *confederacy*.

† The paſſage between the crochets is in ſome places rather obſcure; and affords an inſtance of the great liberty occaſionally taken by the *Molovees* employed in the compoſition of the *Perſian Hedâya*, for which indeed they have endeavoured to apologize, by alledging the exceſſive cloſeneſs and obſcurity of the original text. [See *introductory addreſs*.] The whole paſſage, in the *Arabic*, ſtands *verbatim* thus,—"becauſe he aſſiſts him thereby, and "conſequently attaches him; and he likewiſe, in effect, gives life to him by the deſtruc-"tion of his bondage, whence he inherits of him; and his *Willa*, with reſpect to him, re-"ſembles relationſhip; and alſo, becauſe [there muſt be] an acquiſition for a ſurrender." What is mentioned of "the liability to the *fine of blood* being induced by manumiſſion" is becauſe an emancipator is the *Akilâ* of his freedman. (See *Moâkil.*)

and endowing him with a right of inheritance.

tained by means of manumiſſion; and, II. Inheritance,—becauſe the emancipator has given life to the emancipated by means of removing his bondage, and conſequently inherits of him. The relationſhip of *Willa*, moreover, reſembles relationſhip of blood, with reſpect to inheritance, and the obligation of atonement by fine, the prophet having ſaid, "*The relationſhip of* WILLA *is like the relationſhip of conſanguinity.*"

OBJECTION.—From this it would follow that the emancipated alſo inherits of his emancipator, where he is deſtitute of kindred; (and ſuch is the opinion of *Hàſan Bin Zeeyâd*;) whereas it is otherwiſe.

REPLY.—An emancipated ſlave is a ſtranger with regard to his emancipator, and conſequently does not inherit of him. The emancipator's right, moreover, to inherit of the emancipated, is founded on a particular text of the KORAN, in oppoſition to analogy, which, therefore, muſt not be abandoned or departed from with reſpect to any other inſtance of inheritance.

—Another reaſon, alſo, why the *Willa* of an emancipated ſlave appertains to his emancipator is, that there muſt be an acquiſition for a ſurrender,—or, in other words, an advantage in lieu of a loſs; and as, in conſequence of emancipation, the property involved in the ſlave is deſtroyed, the *Willa* thereof conſequently belongs to his emancipator.] It is to be obſerved that a woman is entitled to the *Willa* of her emancipated ſlave in the ſame manner as a man;—becauſe of the tradition before quoted;—and alſo becauſe it is recorded that upon a freedman of *Hamazá* dying, and leaving a daughter, (*Hamazá* alſo being dead and having left a daughter,) the prophet divided his effects equally between this daughter and the daughter of *Hàmazá*.—It is alſo proper to obſerve that manumiſſion *for* a compenſation, and manumiſſion *without* a compenſation, are alike with reſpect to this rule, as the tradition abovementioned is abſolute.

IF

A ſtipulation of waving the claim to inheritance is invalid.

If a perſon emancipate his ſlave, engaging, at the ſame time, that "he will not claim the right from him," ſuch engagement is null, and the *Willa* appertains to the emancipator notwithſtanding; becauſe the condition here mentioned is contrary to the text [of the Koran,] and is conſequently invalid.

The *Willa* of a ſlave emancipated by *Kitàbat* appertains to his maſter;

Upon a *Mokâtib* paying his ranſom he is free, and the *Willa* belongs to his maſter, although he become free after his [the maſter's] deceaſe *; becauſe he becomes free in conſequence of a contract of *Kitàbat* to which his maſter was a party; and as a *Mokâtib*, like a *Modabbir*, is not a ſubject of inheritance, he is conſequently emancipated while the maſter's right of property continues.—The ſame rule alſo holds with reſpect to a ſlave whoſe maſter has *bequeathed* him manumiſſion,—or a ſlave whom a perſon directs, in his will, to be purchaſed and ſet free upon his deceaſe,—for the act of the executor, after the teſtator's death, is equivalent to the act of the teſtator.

Objection.—The ſlave in queſtion cannot be conſidered as emancipated from the *teſtator*, except where he is his actual property; and he diſcontinues from being his property becauſe of his death.

Reply.—The whole eſtate of the teſtator is regarded as his property as long as there is occaſion,—that is, until his will be executed.

and the ſame of the *Willa* of *Modabbirs*, *Am-Walids*.

If a maſter of ſlaves die, his *Modabbirs* and *Am-Walids* are free, (as has been explained in treating of *manumiſſion*,) and the *Willa* of them belongs to him †, as he emancipated them by making them *Modabbirs* and *Am-Walids*.

---

* In which caſe the *Willa* appertains to his heirs.

† Deſcending, as a heritage, to his heirs.

and ſlaves emancipated by *affinity*.

If a perſon become proprietor of a relation within the prohibited degrees, ſuch relation is free, (as has been explained under the head of *manumiſſion*,) and the *Willa* of him belongs to his perſon, as he is emancipated from his property.

In the emancipation of a pregnant female ſlave, the *Willa* of the fœtus belongs to her emancipator:

If a ſlave marry the female ſlave of any perſon, and ſhe become pregnant, and her maſter then emancipate her, ſhe is accordingly free, together with the fœtus in her womb;—and the *Willa* of the fœtus belongs to her maſter, and never can ſhift from him; becauſe he has emancipated it, not as a dependant of the mother, but independantly, and of itſelf, as being a portion of the mother, and it is capable of being ſo emancipated.—The *Willa* of the child, therefore, cannot ſhift from him, becauſe the prophet has ſaid, "*The* WILLA *belongs to the perſon who emancipates*."—The ſame rule holds if the female ſlave be delivered of a child at any time ſhort of ſix months from the date of her manumiſſion, becauſe in this caſe the exiſtence of the fœtus at the time of manumiſſion is certified. The ſame rule alſo holds if ſhe be delivered of *two* children, one within the ſix months, and the other after they have expired; becauſe thoſe are twins, as having been begotten from one ſeed. It is otherwiſe where a female ſlave, being pregnant, enters into a contract of *Mawalát* with any perſon, and her huſband alſo enters into a ſimilar contract with any other perſon; for in this caſe the *Willa* of the child belongs to the maſter of the *father*, becauſe an embryo cannot of itſelf be a party to a *Mawalát* contract, as that is concluded by propoſal and acceptance, of which an embryo is incapable.

but if ſhe be not delivered within ſix months from the date of her manumiſſion, it may ſhift from him to the *father*'s emancipator.

If the female ſlave mentioned above be delivered of a child *after* ſix months from the date of manumiſſion, the *Willa* belongs to the *mother*'s maſter, becauſe the child is in this caſe free *as a dependant of the mother*, and is therefore a dependant of her with reſpect to the *Willa*. As, however, in this caſe, it is not certain that the child exiſted at the time of manumiſſion, ſo as that it ſhould be emancipated independantly and of itſelf, if the father be afterwards emancipated the *Willa* ſhifts from the maſter of the mother to the maſter of the father, becauſe of the child having become free, not of itſelf, but dependantly. It is otherwiſe where ſhe produces a child *within* ſix months, for in that caſe the *Willa* would not ſhift from the one maſter to the other. The ground of this is, that *Willa* ſtands in the ſame predicament with parentage; for the prophet has ſaid, "WILLA *is a relationſhip as much as the relationſhip of parentage, and cannot be ſold, or given away, or inherited.*" In the ſame manner, moreover, as *parentage* is eſtabliſhed on the part of the *father*, ſo alſo is *Willa*. Beſides, the *Willa* was referred to the mother's maſter, of neceſſity, merely becauſe of the father's incapacity: but upon the father becoming capable, the *Willa* reverts to his maſter;—in the ſame manner as the child of an aſſeverating woman * is of neceſſity referred to her family; but if her huſband afterwards retract his aſſertions, the parentage of it is then eſtabliſhed in him.—It is otherwiſe where a female ſlave is emancipated during her *edit* from the death of her huſband, who was a *Mokátib*, and who has left effects ſufficient to diſcharge his ranſom,—and ſhe brings forth a child at any time within two years from the time of his deceaſe; becauſe in this caſe the *Willa* of the child appertains to the maſter of the mother; for as it is here impoſſible to refer the conception to a period ſubſequent to the father's deceaſe, it muſt therefore be referred to ſome time during his life;—and as the fœtus exiſted † at the time of her manumiſſion, the *Willa* of it therefore belongs to the mother's maſter, ſince he has emancipated the child by itſelf and independantly. It is alſo otherwiſe where a female ſlave is emancipated whilſt in her *Edit* from divorce, and brings forth a child within leſs than two years from the date of her manumiſſion; for in this caſe alſo, notwithſtanding her huſband be emancipated, the *Willa* of the child belongs to the mother's maſter, whether the divorce ſhe was under be reverſible or irreverſible. It belongs to him in the caſe of *ir*reverſible divorce; becauſe after ſuch divorce the begetting of the child cannot be attributed to the father, as his having connexion with the female ſlave in queſtion after an irreverſible divorce would be unlawful, and we muſt always, as far as poſſible, put a fair conſtruction on the acts of a *Muſſulman*. The begetting of it is therefore referred to him *antecedent* to divorce; and as the fœtus exiſts at the time of emancipation, the *Willa* of it conſequently belongs to the mother's maſter, as he has emancipated it of itſelf and independantly. In the ſame manner alſo, it belongs to him in the caſe of *reverſible* divorce; becauſe the child being born of the ſlave in queſtion within leſs than two years, it is poſſible that the fœtus may have exiſted during divorce, in which caſe there is no occaſion for a reverſal of the divorce in order to the eſtabliſhment of the parentage;—or, on the other hand, it is poſſible that the fœtus may not have exiſted during divorce, in which caſe a reverſal of the divorce is eſſential to the eſtabliſhment of the parentage:—now ſuch reverſal is doubtful:—no regard, therefore, is paid to that, but the conception is referred to the time of the marriage; and as the fœtus exiſts at the time of manumiſſion, the child is therefore emancipated independantly and of itſelf. It is written in the *Jama Sagheer*, that if a ſlave marry a freed-woman, and they have children, and thoſe children commit any offences, the fine falls upon the *Mawlas* of the mother; becauſe they have become free as dependants of their mother. Their father, moreover, is not poſſeſſed either of *Akilas* or of *Mawlas* by manumiſſion. Conſequently, they are of neceſſity attached to the *Mawlas* of the mother, in the ſame manner as in the caſe of an aſſeverating woman, before alluded to: but if, afterwards, the father be emancipated, the *Willa* of them ſhifts to the *Mawlas* of the father, as was before explained. The *Mawlas* of the mother, however, are not in this caſe entitled to recover, from the *Mawlas* of the father, the fine they have paid on account of the children's offence, becauſe at the time they paid it the *Willa* of the children appertained to them; and the *Willa* is not eſtabliſhed

---

* Meaning a woman repudiated in conſequence of *Laan*.

† Meaning "the child exiſted as (or, *in the ſtate of*) a *fœtus*."

Digitized by Google

bliſhed to the maſter of the father until he [the maſter] emancipate him [the father]; becauſe the occaſion of *Willa*, namely manumiſſion, cannot be referred to an antecedent time, but is reſtricted to the time of emancipation.—It is otherwiſe with reſpect to the child of an aſſeverating woman, where the mother's tribe pay the fine on account of any offence committed by ſuch child, and the huſband afterwards retracts his imputation againſt her;—for in this caſe the parentage is eſtabliſhed by referring it to the conception of that child; and as the mother's *Mawlas* have not paid the fine willingly, but *per* force, they are accordingly entitled to recover it.

Caſe of a *Perſian* marrying a freed-woman.

If a *Perſian*[*] marry a freed-woman, and they have children, the *Willa* of thoſe children reſts with the *Mawlas* of the mother, whether ſhe was emancipated by an *Arab* or a *Perſian*. The compiler of the *Hedáya* remarks that this is the opinion of *Mohammed*; but that *Aboo Yooſaf* maintains that the child is in this caſe ſubject to the ſame rule with the father, inaſmuch as its parentage is eſtabliſhed in the father, in the ſame manner as if the perſon who married the ſlave in queſtion were an *Arab*.—It is otherwiſe, however, where the perſon who marries her is a *ſlave*; for as a ſlave is, conſtructively, a mere *dead matter*, the caſe is therefore the ſame as if thoſe children had no father whatever. The argument of *Haneefa* and *Mohammed* is that the *Willa* of manumiſſion is ſtrong, and worthy of regard with reſpect to its effects, whence equality is attended to in it, inſomuch that a *Perſian* emancipator is not equal to an *Arab* emancipator. The *parentage* of a *Perſian*, moreover, is weak, as they pay no regard to genealogy; (whence no attention is paid by them to equality in point of family;) and that which is *weak* cannot oppoſe that which is *ſtrong*. It is otherwiſe where the father is an *Arab*, becauſe the parentage of an

---

[*] Arab. *Ajmee.* This term applies not only to the natives of *Perſia*, but of all other countries except *Arabia*. The caſe here conſidered turns upon the ſuperiority which the *Arabs* claim, in point of privileges, over all others.

Arab is ſtrong, and is regarded with reſpect to equality and the payment of fines;—for as the aſſiſtance they afford to each other is on account of affinity or genealogy, there is therefore no neceſſity, in the caſe of an *Arab*, to have regard to the *Willa*.—It is related, in the *Jama Sagheer*, that if a *Nabathean* infidel marry a freed-woman who is a Chriſtian, and become a *Muſſulman*, and enter into a contract of *Mawalát* with any perſon, and they afterwards have children, the *Willa* of thoſe children (according to *Haneefa* and *Mohammed*) appertains to the *Mawlas* of the mother. *Aboo Yooſaf*, on the contrary, maintains that their *Willa* appertains to the *Mawlas* of the father, (namely, his *Mawla Mawalát*;) becauſe, although the contract of *Mawalát* be but weak, ſtill it is on the part of the father;—and hence the children in queſtion reſemble the child of a *Perſian* man and an *Arab* woman;—in other words, as, if a *Perſian* marry an *Arab* woman, and ſhe bring forth a child, it is referred to the father's tribe, ſo alſo in the preſent caſe.—(The ground on which this proceeds is that the parentage of a child is weaker on the part of the mother than on the part of the father.)—The argument of *Haneefa* is that the *Willa* of *Mawalát* is weak, (whence it is capable of diſſolution,) whereas the *Willa* of manumiſſion is ſtrong (whence it is incapable of diſſolution;) and the weak cannot oppoſe the ſtrong.

If the father and mother are both *freed*-perſons, the *Willa* of their children belongs to the father's tribe.

If the father be a freed-man, and the mother a freed-woman, the parentage of their children is referred to the father's tribe; becauſe in this inſtance the parents are both upon an equality; and the father's ſide has the preference, as protection is on his ſide more effectual.

Heirſhip is eſtabliſhed by

By the *Willa* of manumiſſion *Aſoobát** is eſtabliſhed;—in other words, the *Willa* of manumiſſion.

---

* *Aſoobát*, in its literal ſenſe, ſignifies *binding together the branches of a tree, a bundle of arrows*, or ſo forth.—In its ſecondary ſenſe it is uſed to expreſs *the deſcent of inheritance in the male line.*

words, where a perſon emancipates his ſlave he is *Aſſaba*[*] to ſuch ſlave, and is entitled to inherit of him in preference to his maternal uncles or aunts, or other uterine kindred; becauſe the prophet ſaid to a perſon who had purchaſed a ſlave and afterwards emancipated him, "*He whom you have thus emancipated is your brother*; *and if he* "*manifeſt his gratitude, it is the better for him, but the worſe for* "*you*;*—or, if he do not manifeſt his gratitude, it is the worſe for him,* "*but the better for you*; *and if he die without leaving heirs, you are his* "ASSABA."—The daughter of *Hamaza*, moreover, emancipated her ſlave; and the ſlave died, leaving a daughter; and the prophet conſtituted the daughter of *Hamaza* her heir in the manner of an *Aſſaba*, that is, notwithſtanding there was a daughter.—Where, therefore, *Aſoobat* is eſtabliſhed on the part of the emancipator, he precedes the relations; (and ſuch is the opinion of *Alee.*) If, however, the emancipated have any *Aſſabas* by blood, they precede, as the emancipator comes after the paternal kindred.—The ground of this is that, in the ſaying of the prophet above quoted, "*if he die without leaving heirs*," by the term *heirs* is to be underſtood thoſe of the deſcription of *Aſſaba*, as may be inferred from the tradition concerning the daughter of *Hamaza*. The emancipator, therefore, follows after the *Aſſabas*, but not after the maternal kindred[†]. If, on the contrary, the emancipated have no *Aſſabas* by blood, the whole inheritance belongs to the emancipator. This is where there is no participating heir. But where there is a ſharer, the emancipator is entitled to what remains after paying the ſharer his [or her] portion; becauſe the emancipator is the *Aſſaba*, agreeably to the tradition before quoted. The ground of this is, that the *Aſſaba* is one who protects and aſſiſts his family;—and as a maſter aids and aſſiſts his freed-man, (according to what has been already ſtated,) he is therefore his *Aſſaba*. Now an *Aſſaba* takes what remains after paying the portions:—hence the perſon in queſtion takes what thus remains.—If, therefore, the emancipator were firſt to die, and then his freed-man, the eſtate of the latter would go to the *ſons* of the emancipator, not to his *daughters*.

---

[*] *Aſſaba*, in its primary ſenſe, ſignifies a nerve, ſinew, or tendon, of an ox or other animal, with which bundles of arrows, &c. are tied together. Hence *Aſſaba* is uſed to expreſs the firſt heir or head of a family, ſince the various branches of the family are repreſented and (as it were) *bound up* in his perſon.—*Aſoobat* might be rendered *heirſhip*, and *Aſſaba* the *heir*; but as the tranſlator is apprehenſive this might confound thoſe terms with *Wirâſit* and *Wâris*, [*inheritance* and *heir* in the moſt extenſive ſenſe,] he has therefore thought it adviſable, in this place, to preſerve the original terms, for the ſake of diſtinction.

[†] That is, he *precedes* the maternal kindred.

An emancipatreſs is entitled to the *Willa* of her freed-men, &c. but not of their children.

A WOMAN is entitled only to the *Willa* of the perſon whom ſhe has herſelf emancipated, or of the perſon whom ſhe (again) has emancipated, or of the perſon whom ſhe has created a *Mokátib*, or whom her *Mokátib* has created a *Mokátib*, or of the perſon whoſe *Willa* has been transferred[*] to her by her freed-man; becauſe ſuch is the recorded opinion of the prophet upon this ſubject; and alſo becauſe, as power, and the right of poſſeſſing property, are eſtabliſhed in the perſon emancipated by the act of the emancipatreſs, this perſon is accordingly referred (in regard to the *Willa*) to her; and in the ſame manner is referred to her the perſon who is referred to her freed-man. It is otherwiſe with reſpect to *parentage*[†]; (that is, the *Willa* of manumiſſion may be eſtabliſhed on the part of a woman, but parentage cannot be ſo eſtabliſhed;) becauſe *Willa* is eſtabliſhed in conſequence of the occurrence of a power to poſſeſs property, occaſioned by and ariſing from the emancipation, which may proceed from a *woman* in the ſame manner as from a *man*;—whereas parentage is eſtabliſhed by regular cohabitation, [*Firáſh*,] and it is the *huſband* that poſſeſſes the right of cohabitation, not the *wiſe*; for ſhe is the *appropriated*, not the *appropriator*:—hence parentage cannot be eſtabliſhed in a *woman*.

---

[*] Arab. *Jurrá*, literally "*drawn over*."—A caſe of transferring or *drawing over* the *Willa*, is where (for example) the male ſlave of a woman marries a female ſlave, and the maſter of the female ſlave afterwards emancipates her, and ſhe brings forth a child in ſix months from the date of her manumiſſion; when the *Willa* of ſuch child belongs to the mother's maſter; but if, afterwards, the woman emancipate her ſlave, the *Willa* of the child then ſhifts to her, as being the emancipatreſs of the father.

[†] This means that an emancipatreſs is entitled to the *Willa* of her freedmen, &c. but not to the *Willa* of their children.

It is to be obſerved that the eſtate of a freed-man goes to the *Aſſaba* [lineal heir] of the emancipator,—to the neareſt, and after him to the next of kin,—and not ſolely to his *children*; becauſe inheritance does not hold with reſpect to *Willa*, for if ſuch were the caſe, the property of the freed-man would at all events deſcend to the ſons and daughters of the emancipator, (the ſons receiving two ſhares each, and the daughters one,)—whereas it is not ſo.—Hence it is evident that inheritance does not hold in *Willa*.—*Succeſſion*, however, holds with reſpect to it;—but ſucceſſion cannot be eſtabliſhed with regard to any except a perſon from whom proceeds protection and aid; and protection and aid are afforded by *men* only, not by *women*.—Now it being proved that the eſtate of a freed-man goes to the emancipator's *Aſſaba*,—to the neareſt, and after him to the next of kin,—it follows that if a freed-man die, leaving the father and the ſon of his emancipator, the right of *Willa* deſcends to the *ſon*, not to the *father*, (according to *Haneefa* and *Mohammed*,) becauſe the ſon is the neareſt *Aſſaba* [lineal heir;]—and, in the ſame manner, it would go to the maſter's *grandfather*, not to his *brother*, (according to *Haneefa*,) ſince (as he holds) the grandfather is the neareſt of the two.—In the ſame manner alſo, the *Willa* of her freed-man deſcends to the *ſon* of his emancipatreſs, not to her *brother*, for her ſon is the neareſt in lineal ſucceſſion.—If, however, the freed-man were to commit an offence, the fine for it would fall upon her *brother*; becauſe the offence of the freed-man is the offence of the emancipatreſs, and her *brother* is of her paternal kindred, whereas her ſon is not ſo.—If, alſo, a freed-man die, leaving a ſon of his maſter, and the children of another ſon, his eſtate goes to the *ſon*, not

The eſtate of a freed man deſcends to the *lineal* heir of the emancipator, and not to his *heirs general*.

not to the *grand-children*, becauſe the *Willa* deſcends to the neareſt. This is recorded from ſeveral of the companions; and among the reſt from *Amroo*, *Alee*, and *Ibn Maſáood.*

SECTION.

Of the WILLA MAWALÂT, *or* WILLA *of* MUTUAL AMITY.

Nature and effect of a contract of *Mawalát.*

THE caſe of *Willa Mawalát* is where (for inſtance) a ſtranger * ſays to the perſon whoſe proſelyte he is †, or to any other perſon, "I enter into a contract of *Mawalát* with you, ſo that if I die my "property ſhall go to you, or if (on the other hand) I commit an "offence, the fine is upon you or your *Akilá*," and the perſon thus addreſſed aſſents accordingly,—in conſequence of which he becomes the *Mawla* of the ſtranger, and upon his deceaſe without heirs inherits his property.—The ſtranger is termed the *Mawla Aſfal* ‡, and the perſon who thus accedes to the contract the *Mawla Aaila* §.—*Shafeï* maintains that a contract of *Mawalát* does not occaſion inheritance in any reſpect, and is of no force whatever, as it tends to annul the

right

---

* Arab. *Ajimee.* This term (as has been already remarked) ſignifies, generally, any perſon not an *Arab.* It is alſo uſed in the ſame ſenſe among the *Arabs* as *Barbarian* with the *Greeks*, or *Gentile* among the *Jews.* The caſe here ſtated applies to any infidel alien coming into a *Muſſulman* territory under protection, and there embracing the faith, in which caſe it was cuſtomary for ſome *Muſſulman* to adopt him as his proſelyte.

† Literally, "in whoſe hands he has embraced the faith."

‡ Literally, "*the inferior Mawla,*" or the *client.*

§ Literally, "*the ſuperior Mawla,*" or the *patron.*

Digitized by Google

right of the public treaſury *;—whence the invalidity of it with reſpect to any other heir; for if it were valid with reſpect to ſuch, his right of heritage would be annulled;—and on this ground alſo it is, that (according to *Shafeï*) a man's bequeſt of his *whole* property is invalid although the teſtator be deſtitute of heirs; for ſtill (according to him) ſuch bequeſt holds good to the amount only of a third of his property, ſince if it were effectual to the amount of the whole, the right of the public treaſury would be annulled †.—The arguments of our doctors upon this point are twofold.—First, God has ſaid, in the Koran, "Allow, to those who enter into contracts, "their share of inheritance," which text related to contracts of *Mawalât*:—and it is alſo recorded that the prophet, upon being queſtioned concerning a certain perſon who had become the proſelyte of another, and entered into a contract of *Mawalât* with that other, replied, "*This perſon is endowed with a right with regard to that man,* "*ſuperior to all others, both during life and in death,*"—from which it may be inferred, that during his proſelyte's life he is ſubject to fines on his account, and upon his deceaſe is his heir.—Secondly, the property of the proſelyte is this perſon's right, whence he is at liberty to make uſe of it in any manner he pleaſes: for the property would fall to the public treaſury only from this neceſſity, that there are no claimants to it, not becauſe the public treaſury has any right in it.—If, however, the proſelyte leave any natural heir, ſuch heir precedes the *Mawla Mawalât*, notwithſtanding he be of the *uterine* kindred, (ſuch as a *maternal uncle* for inſtance;) becauſe the two perſons in queſtion are the only parties to the contract, whence it is not binding upon any other; and an uterine relation is entitled to inheritance.—It is to be obſerved, that in the contract in queſtion the parties muſt particularly mention and ſtipulate fine and inheritance, as has been explained in the exemplification of the caſe. If, therefore, the ſtipulation of inheritance be made on *both* parts, whoever dies firſt inherits of the other; but if on *one* part only, heritage holds agreeably to ſtipulation. In the ſame manner alſo, if reſponſibility for fines be ſtipulated on both parts, each is reſponſible for the fines incurred by the other; but if on *one* part only, reſponſibility holds accordingly; for a thing is rendered obligatory only by undertaking for it; and it cannot be undertaken for but by ſtipulation. It is alſo to be obſerved, that it is eſſential, in contracts of *Mawalât*, that the *Mawla Asfal*, or client, be a ſtranger [*Ajmee,*] and not an *Arab*; becauſe among the *Arabs* aid and patronage run in families or tribes,—(that is, one *Arab* aids or patronizes another where they are both of the ſame tribe or family,)—whence they have no occaſion for engaging in contracts of *Mawalât*.

---

* Where a ſtranger dies without heirs, the whole of his property goes to the public treaſury.

† He holding that, in caſe of a perſon dying without heirs, *two thirds* of his property muſt go to the public treaſury at all events.

Either party may diſſolve the contract in preſence of the other;

The *Mawla Asfal*, or client, is at full liberty to deſert from his *Mawla Aailá*, or patron, and to enter into a contract of *Mawalât* with ſome other perſon, ſo long as the firſt ſhall not have paid any fine of his incurring; becauſe a contract of *Mawalát* is, like bequeſt, a reverſible deed.—In the ſame manner, alſo, the *Mawla Aailá*, or patron, is at liberty to relinquiſh his right of *Willa*, and to break off the contract of *Mawalât*, becauſe ſuch a contract is not binding.—It is requiſite, in caſe of either party diſſolving the contract, that it be diſſolved in the preſence of the other, in the ſame manner as in the caſe of diſmiſſing an agent, where the diſmiſſion is expreſs, and not implied, or virtually induced.—It is otherwiſe, however, where the client enters into a contract of *Mawalât* with a perſon in the abſence of the former patron; for in this caſe the firſt contract of *Mawalát* is diſſolved without the preſence of the party, this being a diſſolution by effect, and neceſſarily reſulting;—in other words, the diſſolution of the firſt contract is a neceſſary conſequence of the formation of the ſecond.—In this caſe, therefore, the preſence of the other party is not requiſite; in the ſame manner as the preſence of an agent is not requiſite where he is virtually diſmiſſed from his employment, by the conſtituent (for inſtance)

or the *inferior* party may break it off in the ſuperior's abſence, by engaging in a *Mawalát* with ſome other perſon:

Digitized by Google

ſtance) himſelf ſelling the article concerning which he had conſtituted him his agent for ſale.

but he cannot do ſo, after the other has paid a fine incurred by him.

Where the patron pays the fine incurred for an offence committed by his client, the latter is incapacitated from quitting him and engaging in a contract of *Mawalât* with any other perſon;—becauſe the right of another then becomes implicated; and alſo, becauſe the fine was decreed by the *Kâzee*.—Beſides, the fine paid by the patron on his account ſtands as a valuable conſideration, in the ſame manner as the return for a gift; whence he has it not in his power to turn from his patron, in the ſame manner as a donor, after receiving a return, cannot recede from his gift.—In the ſame manner alſo, the child of the client cannot turn from the patron who has paid a fine on account of its father; and ſo likewiſe, if the patron pay a fine on account of the child of his client, neither the client nor his child can afterwards turn from the patron, becauſe with regard to the *Willa Mawalât* they are as one perſon.

A freedman cannot engage in a contract of *Mawalât*.

An emancipated ſlave, as having a *Mawla* in his emancipator, is not at liberty to enter into a contract of *Mawalât* with any perſon; becauſe the *Willa* of *Manumiſſion* is binding, whereas the *Willa of Mawalât* is not ſo; and during the exiſtence of a thing which is forcible and binding, a thing which is not ſo cannot take place.

Digitized by Google

H E D A Y A.

BOOK XXXIV.

Of I*KRÀH, or* C*OMPULSION.*

The nature of compulſion defined.

IKRÀH, or compulſion, applies to a caſe where the compeller has it in his power to execute what he threatens,—whether he [the compeller] be the *Sultan*, or any other perſon, as a *thief* (for inſtance.)—The reaſon of this is, that compulſion implies an act which men exerciſe upon others, and in conſequence of which the will of the other is ſet at nought, at the ſame time that his power of action ſtill remains.—Now this characteriſtic does not exiſt unleſs the other (namely, the perſon compelled) be put in fear, and apprehend that if he do not perform what the compeller deſires, the threatened evil

Digitized by Google

evil will fall upon him;—and this fear and apprehenſion cannot take place unleſs the compeller be poſſeſſed of power to carry his menace into execution; but provided this power does exiſt, it is of no importance whether it exiſt in the *Sultan* or in any other perſon. With reſpect to what is recorded from *Haneefa*, that "compulſion cannot "proceed from any except the *Sultan*," the learned remark that this difference originates merely in the difference of times, and not in any difference of argument; for in his time none poſſeſſed power except the *Sultan*, but afterwards changes took place with reſpect to the cuſtoms of mankind.—It is to be obſerved that, in the ſame manner as it is eſſential, to the eſtabliſhment of compulſion, that the compeller be able to carry his menace into execution, ſo likewiſe it is requiſite that the perſon compelled be in fear that the thing threatened will actually take place; and this fear is not ſuppoſed except it appear moſt probable to the perſon compelled that the compeller will execute what he has threatened, ſo as to force and conſtrain him to the performance of the act which the compeller requires of him.

A perſon forced into a contract may afterwards diſſolve it,

If a perſon exerciſe compulſion upon another, by cutting, beating, or impriſonment, with a view to make him ſell his property, or purchaſe merchandize, or acknowledge a debt of one thouſand *dirms* to a particular perſon, or let his houſe to hire, and this other accordingly ſell his property, purchaſe merchandize, or ſo forth, he has it afterwards at his option either to adhere to the contract into which he has been ſo compelled, or to diſſolve it, and take back or reſtore the article purchaſed or ſold; becauſe one eſſential to the validity of any of theſe contracts is that it have the conſent of both parties, which is not the caſe here, as the compulſion by blows or other means rather occaſions a diſſent; and the contract is therefore invalid.—(This rule, however, does not hold where the compulſion conſiſts only of a ſingle blow, or of impriſonment for a ſingle day, ſince fear is not uſually excited by this degree of beating or confinement. Compulſion, therefore, is not eſtabliſhed by a ſingle blow, or a ſingle day's impriſonment;

unleſs the means of compulſion be trifling.

ment;—unleſs the compelled be a perſon of rank, to whom ſuch a degree of beating or confinement would appear detrimental or diſgraceful; for with reſpect to ſuch a perſon compulſion is eſtabliſhed by this degree of violence, as by it his volition is deſtroyed.)—In the ſame manner, alſo, an *acknowledgment* extorted by any of the above modes of compulſion is invalid; becauſe acknowledgment is a ſpecies of proof, inaſmuch as truth is more probable, in acknowledgment, than falſehood; but in a caſe of compulſion *falſehood* is moſt probable, as a man will acknowledge falſely where, by ſo doing, he may avoid injury.

The purchaſer becomes proprietor of goods ſold upon compulſion.

An acknowledgment extorted by compulſion is invalid;

Where a perſon ſells goods by compulſion, as above ſtated, and makes delivery of them under the influence of ſuch compulſion, the purchaſer becomes proprietor of them, according to our doctors.—*Ziffer* maintains that he does not become proprietor, becauſe a ſale by compulſion depends, for its validity, upon the aſſent of the ſeller, and a ſale ſo circumſtanced cannot endow with a right of property until ſuch aſſent be ſignified. The argument of our doctors is that, in the caſe in queſtion, the pillar of ſale (ſignified by propoſal and acceptance) has proceeded from fit perſons with reſpect to a fit ſubject; the ſale being merely *invalid*, from a want of one of the eſſentials of ſale, namely, the mutual conſent of the parties; and the purchaſer, in an invalid ſale, becomes proprietor of the article upon obtaining poſſeſſion of it; whence it is that if a perſon take poſſeſſion of a ſlave purchaſed under an invalid contract, and then emancipate him, or perform ſuch other act with reſpect to him as cannot afterwards be annulled, it is valid, and he muſt pay the ſeller the value, as is the rule in all caſes of invalid ſale.—After the compulſion has ceaſed, however, if the ſeller ſignify his aſſent, the ſale then becomes lawful and valid, becauſe by ſuch aſſent the cauſes of invalidity (namely, compulſion and unwillingneſs) are removed.

but the ſeller may reſume the article, provided he does not ſignify his aſſent to the ſale.

Where a perſon thus ſells his property by compulſion, he has ſtill a right, as long as he does not ſignify his aſſent to the ſale, to take back the article, although the purchaſer ſhould have ſold it into the hands of another perſon.—It is otherwiſe in all other caſes of invalid ſale; for in thoſe, after the purchaſer has ſold the article, the ſeller has no right to take it back; becauſe the invalidity of ſale in thoſe caſes is on account of the right of the LAW; and when the purchaſer ſells the article to any third perſon, the right of that perſon becomes involved in this ſecond contract; and his right precedes the right of the LAW, as the individual is neceſſitous, whereas the LAW is not ſo.—In a caſe of *compulſion*, on the contrary, the invalidity of the ſale is on account of the right of the ſeller; and as he is an individual, it follows that, in this caſe, notwithſtanding the right of the ſecond purchaſer be involved in the ſecond contract, ſtill both rights are upon a *par*, as being both rights of the individual; and conſequently, the right of the firſt cannot be annulled by the right of the ſecond.

Caſe of a *Waffa* ſale.

It is to be obſerved that ſome conſider a *Waffa* ſale * to be invalid, in the ſame manner as a *compelled* ſale, and apply to it the rules of ſale by compulſion; whence (according to them) if the purchaſer in a *Waffa* ſale ſell the article purchaſed, the ſale ſo made by him may be broken through, as the invalidity of the ſale, in this caſe, is on account of the non-conſent of the ſeller, in the ſame manner as in a caſe of compulſion.—*Waffa* ſale is where the ſeller ſays to the purchaſer "I ſell you this article in lieu of the debt I owe you, in this "way, that upon my paying the debt the article is mine."—Some determine this to be, in fact, a contract of pawn; for between it and pawn there is no manner of difference, as, although the parties denominate it a *ſale*, ſtill the intention is, in effect, a *pawn*. Now in all acts regard is paid to the ſpirit and intention; and the ſpirit and intention of pawn exiſt in this inſtance,—whence it is that the ſeller is at liberty to reſume the article from the purchaſer upon paying his debt to him.—Some, again, conſider a *Waffa* ſale to be utterly null, as the purchaſer, in the caſe in queſtion, reſembles a perſon in jeſt, ſince he (like a jeſter) repeats the words of ſale, at the ſame time that the effect and purpoſe of ſale are not within his deſign. Such ſale is therefore utterly null and void, in the ſame manner as a ſale made in jeſt. The *Haneefite* doctors of *Samarcand*, on the other hand, hold a *Waffa* ſale to be both valid and uſeful, as it is a ſpecies of ſale commonly practiſed from neceſſity and convenience, and is attended with advantage in regard to ſome effects of ſale, ſuch as the *uſe* of the article, although the purchaſer cannot lawfully diſpoſe of it.

---

* Literally "a *ſecurity* ſale;" ſo termed becauſe by it the ſeller inſures to the purchaſer the debt he owes him.

A *compelled* ſale is rendered valid if the ſeller *willingly* receive the price;

If, in a caſe of compulſion, the ſeller take poſſeſſion of the price readily and willingly, the ſale is valid, as his thus taking poſſeſſion of the price is an argument of its validity; in the ſame manner as where, in a ſuſpended ſale, the ſeller readily and willingly receives the price of the article, ſuch receipt argues the validity of the ſale.—So likewiſe, if a perſon advancing part of the price conclude a *Sillim* contract by compulſion, and the party who received the advance ſhould afterwards readily and willingly deliver the article for which the advance had been paid, his ſo doing is an argument of the validity of the tranſaction. It is otherwiſe where one perſon compels another to make a gift, ſaying to him "make a gift of this article to ſuch a perſon,"—but without adding to the word gift "*and delivery*," and the perſon thus compelled make gift and *delivery* of the article to the perſon named; for ſuch gift is utterly null, becauſe the deſign of the compeller is that the donee ſhall be endowed with a right in the article upon the inſtant of donation; and this deſign cannot be obtained, in a caſe of gift, but by a *delivery* of the article to the perſon ſpecified. In a caſe of *ſale* by compulſion, on the other hand, the end of the compeller is obtained on the inſtant of compelling the party to accede to the

Digitized by Google

the *contract* of ſale. *Gift* upon compulſion, therefore, comprehends a delivery of the article to the donee; whereas *ſale* upon compulſion does not comprehend a delivery of the article ſold to the purchaſer,—whence it is that if the ſeller, after acceding to the contract from compulſion, make delivery of the article *without* compulſion, the ſale is rendered valid by ſuch delivery,—whereas the *gift* in queſtion is not rendered valid by a delivery of the article to the donee.

but it is not valid if he be *compelled* to receive it.

If, in a caſe of compulſion, the ſeller take poſſeſſion of the price *by compulſion*, ſuch receipt does not render the ſale valid; and it is accordingly incumbent on him to return the price to the purchaſer, if it remain in his hands, becauſe of the contract being invalid. If, however, the price have been loſt, or have periſhed in his hands, nothing can be taken from him in lieu of it, becauſe it was merely a *truſt* with him, inaſmuch as he took poſſeſſion of it by conſent of the proprietor, namely the purchaſer.

A ſale in which the ſeller is compelled but not the purchaſer, leaves the latter reſponſible for the article, in caſe it be loſt in his hands.

If one perſon compel another to ſell an article to a *third* perſon, but do not compel this perſon to purchaſe the article, and it afterwards periſh in the purchaſer's hands, he [the purchaſer] is reſponſible to the ſeller for the value, as the article is inſured in his hands, ſuch being the law of invalid ſale. It is to be obſerved, however, that in this caſe the ſeller is at liberty to take the compenſation from the compeller; becauſe as it was (in a manner) he who gave the article to the purchaſer, it may be ſaid that it is *he* who has loſt or deſtroyed the ſeller's property. In ſhort, the ſeller, in the caſe in queſtion, is at full liberty to take the compenſation from either of the two; in the ſame manner as the proprietor of an uſurped article is at liberty to take his compenſation from either party, where the article has firſt been uſurped from him, and then uſurped by ſome other from the firſt uſurper. If, however, the ſeller take his compenſation from the compeller, he [the compeller] is entitled to recover the value from

the

the purchaſer, ſince, in conſequence of paying the compenſation for the article, he ſtands as ſubſtitute to the ſeller.—It is to be obſerved that, in a caſe of uſurpation, if the uſurper ſell the article to *Amroo*, and he (again) ſell it to *Khâlid*, and he (again) ſell it to *Bikroo*, and ſo on, from hand to hand, and the proprietor take his compenſation from *Khâlid* (for inſtance,) in this caſe every purchaſe ſubſequent to that of *Khâlid* is legal and valid; becauſe as *Khâlid*, in conſequence of paying the compenſation, becomes proprietor of the uſurped article, he then appears to have ſold his own property; whereas every purchaſe made before, and even the purchaſe of *Khâlid* himſelf, is invalid; becauſe the article uſurped becomes the property of *Khâlid*, by retroſpect, from the time only that he took poſſeſſion of it. It is otherwiſe where ſimilar circumſtances follow a compulſive ſale; for if, in ſuch caſe, the party compelled (namely, the firſt ſeller) ſignify his aſſent to any one of the ſubſequent contracts, every other contract antecedent to that one is valid, and ſo likewiſe every ſubſequent contract; becauſe the invalidity of theſe contracts was on account of the right of the proprietor, as he had ſold his property upon compulſion; and he therefore poſſeſſes a right to reſume the property, until he ſignify his aſſent: but upon his aſſenting to any of thoſe contracts, he relinquiſhes this right; and all the contracts become valid of courſe.

SECTION.

A perſon may lawfully eat or drink a prohibited article, upon a compulſion which threatens *life* or *limb*.

If one perſon uſe compulſion towards another, by impriſonment or blows, with a view to make him eat carrion or drink wine, ſtill it is not lawful for the perſon thus compelled to eat or drink of thoſe articles,—unleſs he be threatened with ſomething dangerous to life or limb, in which caſe he may lawfully do ſo; (and the ſame rule obtains if compulſion be uſed to make a perſon eat *blood* or *pork*;)—becauſe the eating of ſuch prohibited articles is not permitted except in caſes of extremity, ſuch as famine, ſince in any other caſe the argument of illegality ſtill endures. Now *extremity*, or *unavoidable neceſſity*, do not exiſt, to require the eating or drinking of the article, except the *not* eating it be attended with danger to life or limb; but as the eating or drinking is in ſuch caſe permitted, it follows that it is ſo permitted where this danger is to be apprehended from impriſonment or blows. Neither is the perſon, who is thus put in fear, under any obligation to ſuffer the thing menaced; but rather, if he *do* ſuffer it, and refrain from eating or drinking the prohibited article until he die, or loſe any of his limbs, he is an offender; becauſe as, under ſuch circumſtances, the eating or drinking is permitted to him, it follows that, if he refuſe, he is an acceſſary with another to his own deſtruction, and is conſequently an offender, in the ſame manner as if he were to refrain from eating carrion when periſhing for hunger. *Aboo Yooſaf* maintains that he would not be an offender from perſiſting, unto death or diſmemberment, in his refuſal; becauſe the eating or drinking, in the caſe in queſtion, is merely licenſed, (ſince the articles ſtill continue prohibited,)—whereas the refraining from them is an obſervance of the LAW; and conſequently, in perſiſting to refuſe, he acts in obedience to the LAW.—To this, however, it may be replied, that

Digitized by Google

that in the caſe in queſtion the illegality no longer remains; becauſe, as a ſituation of *compulſion* or *indiſpenſable neceſſity* is particularly excepted in the KORAN, it follows that under the circumſtances here deſcribed the argument of illegality does not exiſt: hence the eating is poſitively *lawful*, and not merely *licenſed*. It is to be remarked, however, that in the caſe in queſtion the compelled perſon is an offender only where he knows the eating to be lawful and nevertheleſs refrains; becauſe as its legality is a matter of a concealed nature, it follows that he ſtands excuſed, from ignorance,—in the ſame manner as men are excuſed for omiſſions or neglects, from ignorance, in the beginning of their converſion to the faith, or during their reſidence in a hoſtile country.

A perſon muſt not declare himſelf an infidel, or revile the prophet, upon compulſion, unleſs he be in danger of otherwiſe loſing life or limb.

IF one perſon compel another to turn infidel, or to revile the prophet, by impriſonment or blows, ſtill compulſion [in its *legal* and *exculpatory* ſenſe] is not eſtabliſhed; but if he menace him with ſomething which puts him in fear, and gives room to apprehend danger to life or limb, in this caſe compulſion is eſtabliſhed.—The reaſon of this is, that as by mere blows or impriſonment compulſion is not eſtabliſhed with regard to eating prohibited meats, (as was before explained,) it follows that it is not eſtabliſhed with regard to infidelity *a fortiori*, ſince the illegality of infidelity is much greater. When, therefore, a perſon is put in fear for his life or limbs, ſo as that compulſion is eſtabliſhed, it is lawful for him to make an exhibition of infidelity, (that is, to repeat infidel expreſſions:)—and if he merely exhibit this with his lips, but keep his heart ſteady in the faith, he is not an offender; becauſe when *Amâr* had fallen into the hands of the infidels, and they had compelled him to revile the prophet, he ſaid to him, "*If you find your heart ſtill firm in the faith, your uttering* "*infidel expreſſions is immaterial*;—*nay, if they again ſhould compel you,* "*you may again repeat ſuch infidel expreſſions*;"—and a paſſage in the KORAN was alſo revealed to the ſame effect. Another reaſon is that by uttering infidel expreſſions *faith* is not deſtroyed, ſince the actual faith (by which is underſtood *rectitude of heart,)* ſtill continues unaffected, and if he were to refuſe uttering ſuch infidel expreſſions he would incur actual deſtruction, as the infidels would in that caſe diſmember or put him to death.—Yet if he perſiſt in refuſing unto death, he has a claim to merit, and is entitled to his reward; becauſe *Jeeb* perſevered in refuſing, and ſuffered death in conſequence; and the prophet gave him the name of *Seyd al Shaheed* [the martyr,] and declared, in afterwards ſpeaking of him, "*he is my friend in heaven*;" and alſo becauſe, in thus acting, his honour is effectually preſerved. A refuſal, moreover, for the ſake of religion, to utter any infidel expreſſions, is an obſervance of the LAW: in oppoſition to the caſe before ſtated, as there the eating of carrion, or ſo forth, is poſitively lawful, becauſe of the exception cited on that ſubject.

IF one perſon compel another to deſtroy the property of a *Muſſulman*, by menacing him with ſomething dangerous to life or limb, it is lawful for the perſon ſo compelled to deſtroy that property; becauſe the property of another is made lawful to us in all caſes of neceſſity, (ſuch as in a ſituation of *famine* for inſtance,) and in the caſe in queſtion this neceſſity is eſtabliſhed.—The owner of the property muſt in this inſtance take his compenſation from the *compeller*; becauſe the compelled is merely the inſtrument of the compeller in any point where he is capable of being ſo; and the deſtruction of property is of that nature.

A perſon deſtroying the property of another upon compulſion is not reſponſible; but the compeller is ſo.

IF one perſon compel another, by menacing him with death, to murder a third perſon, ſtill it is not lawful for the perſon ſo menaced to commit the murder, but he muſt rather refuſe, even unto death.—If, therefore, he notwithſtanding commit the murder, he is an offender, ſince the ſlaying of a *Muſſulman* is not permitted under any neceſſity whatever.—In this caſe, however, the retaliation is upon the compeller, if the murder be *wilful*.—The compiler of the *Hedâya* remarks that this is according to *Haneefa* and *Mohammed*; and that *Ziffer*,

A perſon *murdering* another upon compulſion is an offender; but the compeller is liable to retaliation.

fer, on the contrary, maintains that the retaliation is upon the compelled perſon;—whereas *Aboo Yooſaf* holds that there is no retaliation upon either party,—and *Shafeï* (on the contrary) contends that it is incurred by both.—The argument of *Ziffer* is, that the act of murder has proceeded from the compelled perſon, both *de facto* and *quo animo*, and the LAW, alſo, has attached to him the effect of it, namely criminality: conſequently he incurs retaliation.—(It is otherwiſe in the caſe of deſtroying the property of another upon compulſion; ſince as the LAW has not attached the effect thereof, namely the criminality, to him, it is conſequently referred to another, namely the compeller.) Such alſo is the argument of *Shafeï* for awarding retaliation upon the compelled perſon: and his argument for awarding it upon the compeller is, that from him proceeded the moving cauſe of the murder, as the compulſion was the cauſe of it; and the moving cauſe in murder ſtands (according to him) ſubject to the ſame rule with the actual perpetration;—as in the caſe of witneſſes whoſe evidence induces retaliation; in other words, if two witneſſes give evidence of a wilful murder, and in conformity with their teſtimony retaliation be executed upon the accuſed, and the perſon to whoſe murder they had borne teſtimony afterwards prove to be ſtill living, thoſe witneſſes are then put to death in retaliation. The argument of *Aboo Yooſaf* is that concerning the propriety of awarding retaliation upon the *compelled* perſon there is a doubt; and, in the ſame manner, there is alſo a doubt concerning the propriety of awarding it upon the *compeller*; for in one way the view is to fix the murder upon the *compelled*, becauſe of his being an offender, and it is alſo fixed upon the *compeller*, becauſe of his being the *mover*:—thus a doubt oppoſes itſelf with reſpect to each; and hence neither of them is liable to retaliation. The argument of *Haneefa* and *Mohammed* is that the compelled perſon is, in this inſtance, forced to the commiſſion of the murder by a natural inſtinct, which leads a man to prefer his own life to that of another; and he muſt therefore, as far as is poſſible, be regarded as the inſtrument of the compeller. He is accordingly conſidered as his inſtrument in the commiſſion of the murder, in the manner of a weapon. He cannot, however, be his inſtrument with regard to the *criminality* of the murder, in ſuch a way as that no part of the criminality would attach to himſelf, but the whole be imputable to the compeller; and hence the murder, with regard to its criminality, is reſtricted to the perſon compelled.—This is therefore in ſome meaſure analogous to a caſe of compulſive manumiſſion,—or of a perſon compelling a *Magian* to ſlaughter * a goat; that is to ſay, if one perſon compel another to emancipate his ſlave, and he emancipate him accordingly, in this caſe the emancipation is referred and imputed to the compeller, whence he is anſwerable for the value of the ſlave,—but the emancipation is imputed to the compelled with regard to the *execution* of it, for if it were in this reſpect alſo imputed to the compeller, the ſlave would not become free;—and, in the ſame manner, if a perſon compel a *Magian*, or other idolator, to ſlaughter the goat of another, his act is referred and imputed to the compeller, with regard to the deſtruction of the property, but not with regard to a lawful *Zabbah*, whence the goat is prohibited and carrion;—and ſo likewiſe, in the caſe in queſtion, the act of the compelled perſon is imputed to the compeller with reſpect to the *deſtruction*, not with regard to the *criminality*.

Caſe of compelled *divorce* or *emancipation*.

If one perſon compel another to divorce his wife, or to emancipate his ſlave, and this perſon accordingly divorce his wife or emancipate his ſlave, ſuch divorce or emancipation takes effect, according to our doctors: in oppoſition to the opinion of *Shafeï*, as has been already ſtated under the head of Divorce.—In the caſe of compulſive manumiſſion, the perſon compelled is entitled to take the value of the ſlave from the compeller, becauſe as in this caſe the compelled admits of being conſidered as the inſtrument of the compeller with regard to the deſtruction of property, to him ſuch deſtruction is accordingly referred and imputed. Hence he is at liberty to ſeek a compenſation from the compeller, whether rich or poor; and the ſlave is not liable to emancipatory labour, as that could only be due from him either with a view to his emancipation, or on account of the right of ſome other perſon being involved in him, neither of which motives exiſt in the preſent inſtance.—It is alſo to be obſerved that the compeller, in this caſe, is not entitled to take from the ſlave his value as paid to his proprietor; becauſe as he [the compeller] is ſued on the ſcore of a *deſtruction* of the ſlave, it may therefore be ſaid that he has (as it were) murdered or made away with the ſlave; and he [the ſlave] conſequently cannot be reſponſible.—In the caſe of compelled divorce, alſo, the perſon compelled is entitled to take from the compeller half the dower, provided the divorce be before conſummation;—or, if no dower was mentioned in the marriage contract, he may take from him that for which he is himſelf in ſuch caſe reſponſible, namely a *Matât*, or *preſent*, as that is what he incurs by the divorce*.—It is otherwiſe where the compelled divorce is pronounced *after* conſummation; for in that caſe the dower has been already made due by the conſummation, and is not made ſo by the divorce.

---

* Arab. *Zabbah*. (It is fully explained under its proper head.)

Caſe of a compelled appointment of *agency* for divorce or emancipation.

If a perſon, upon compulſion, create another his agent for divorce or emancipation, and the agent divorce the wife, or emancipate the ſlave, of the perſon thus compelled to authorize him, ſuch divorce or manumiſſion is valid, on a favourable conſtruction; becauſe a *compelled* contract or commiſſion, provided it be ſuch as is rendered invalid by involving an invalid condition, is invalidated by the compulſion; but a commiſſion of agency is *not* rendered invalid by involving an invalid condition.—In the caſe of divorce, the compelled conſtituent is entitled to take half the dower from the compeller,—and, in the caſe of manumiſſion, to take from the compeller the value of the ſlave; becauſe in both caſes the end and deſign of the compeller was to deſtroy the conſtituent's right of property, in performing the act for which he appointed him agent.—It is to be obſerved, as a rule, that in all deeds or contracts which, after engagement, do not admit of reverſal or diſſolution,

No deed, in itſelf irreverſible, can be

---

* See Vol. I. p. 125.

ſolution, compulſion has no effect whatever, but they are equally obligatory and valid under compulſion as otherwiſe. Hence compulſion has no operation upon a vow, ſince this (unleſs it be of a *ſuſpended* nature) is incapable of diſſolution; and accordingly, the perſon compelled into ſuch a vow is not entitled to take any thing whatever from the compeller in conſideration of the loſs he incurs by ſuch vow.—In the ſame manner, alſo, compulſion is attended with no effect in oaths, or in *Zihâr*, as thoſe do not admit of retraction; and reverſal of divorce and *Aila* are alſo ſubject to the ſame rule, as well as a recantation of an *Aila* oath at the time of making the aſſeveration.—In *Khoola*, alſo, as being a ſuſpenſion of divorce on the part of the huſband, (for he ſuſpends it on the payment of the conſideration,) compulſion is attended with no effect, ſince it is incapable of reverſal or diſſolution; and accordingly, if the huſband be compelled into it, not the wife, ſhe is anſwerable for the conſideration, ſince ſhe aſſents to it, as having undertaken for it without compulſion.

retracted after being executed by compulſion.

If a perſon, upon compulſion, commit whoredom, he is liable to puniſhment, according to *Haneefa*,—except where the compeller is a *Sultan*.—The two diſciples, on the contrary, maintain that he is not liable to puniſhment in either caſe.

Whoredom **by compulſion incurs puniſhment.**

If a perſon, upon compulſion, become an apoſtate by pronouncing a renunciation of the faith, yet his wife is not ſeparated from him; becauſe apoſtacy has a connexion with belief, whence if his mental faith continue firm, he does not become an infidel by the mere verbal renunciation.—In the caſe in queſtion, moreover, his infidelity is dubious, and conſequently his wife is not ſeparated from him, becauſe of the doubt.—If, therefore, the huſband and wife differ, ſhe inſiſting that ſhe has been ſeparated, and he that his renunciation was only pronounced outwardly, but that his faith ſtill remains firm, his declaration muſt be credited; becauſe a declaration of apoſtacy is never uſed with a view to effect a matrimonial ſeparation, but merely ſignifies a

Caſe of *apoſtacy* upon compulſion.

change of belief; and the compulſion, on the other hand, affords an argument that the belief has not been altered:—conſequently his declaration muſt be credited.—It is otherwiſe with reſpect to a man turning *Muſſulman* upon compulſion; as a man who embraces the faith upon compulſion is nevertheleſs admitted to be a *Muſſulman*, becauſe of the poſſibility that his faith accords with his words.—In ſhort, in both caſes (namely, compulſion to apoſtacy, and compulſion to *Iſlâm*) a preference is given to *Iſlâm*, as it is the ſuperior, and cannot be overcome.—What is here advanced relates merely to the award of the *Kâzee* *; for with God, if the perſon do not believe in his heart, he is not a *Muſſulman*.

Caſe of *Iſlâm* upon compulſion.

If a perſon become a *Muſſulman* upon compulſion, ſo as to be *decreed* a *Muſſulman*, and afterwards apoſtatize, ſtill he is not worthy of death, ſince his *Iſlâm* is doubtful, and doubt prevents the execution of death upon him.

Caſe of a huſband acknowledging his having apoſtatized upon compulſion.

If a perſon, after having made, upon compulſion, a declaration of infidelity, ſhould ſay to his wife, who claims a ſeparation, "I ſaid a "thing in which I was not ſerious," (in other words, "I ſpoke "falſely,") in this caſe his wife is ſeparated from him in the conception of the *Kâzee* †, and he [the *Kâzee*] muſt iſſue a decree accordingly, although there be no ſeparation before God.—The reaſon of this is, that from his acknowledgment it is eſtabliſhed that he was not compelled into his declaration, but made it without compulſion, as the compeller uſed compulſion towards him *not* with a view to extort the declaration from him, but with a view to make him change his faith; and as he, of his own choice, made the declaration of infidelity, and his wife claims a ſeparation, his allegation that "he intended nothing" cannot be credited with the *Kâzee*, who muſt therefore iſſue a decree of ſeparation, although there be no ſeparation in the ſight of God.—

---

* That is, "relates to the mere *point of law.*"

† That is, "*in the eye of the* law."

If, on the other hand, he allege that "he intended merely to ſulfil "the deſign of the compeller, namely, *to make a declaration of infi*"*delity*, at the ſame time that he ſpoke under a mental reſervation," in this caſe his wife is ſeparated from him both with the *Kâzee*, and alſo in the ſight of God; becauſe in this caſe he appears to have made *a ſerious declaration of infidelity*, notwithſtanding he may have ſcreened himſelf under the mental reſervation.—In the ſame manner, if a perſon compel another to worſhip a croſs, or to revile the holy perſon of the prophet, and he do ſo accordingly, and afterwards plead that "his "deſign in worſhipping was the worſhip of God,"—or "by *Mohammed* "he meant ſome other than the prophet," his wife, claiming ſeparation, is ſeparated from him with the *Kâzee*, but not in the ſight of God;—whereas if he were thus to worſhip a croſs, or to revile the prophet, under a mere mental reſervation, his wife would be ſeparated from him both with the *Kâzee*, and alſo in the ſight of God, for the reaſons above ſtated.

HEDAYA.

BOOK XXXV.

Of *HIJHR*, or *INHIBITION.*

Definition of the term.

HIJHR, in its primitive ſenſe, means interdiction or prevention. In the language of the LAW it ſignifies an interdiction of action, with reſpect to a particular perſon, who is either an infant, an ideot, or a ſlave,—the cauſes of inhibition being three,—infancy, inſanity, and ſervitude.

Chap. I. Introductory.
Chap. II. Of Inhibition from Weakneſs of Mind.
Chap. III. Of Inhibition on account of Debt.

CHAP.

CHAP. I.

Inhibition operates upon infants, ſlaves, and lunatics;

THE acts* of an infant are not lawful unleſs authorized by his guardian, nor the act of a ſlave unleſs authorized by his maſter;—and the acts of a lunatic, who has no lucid intervals, are not at all lawful. The acts of an *infant* are unlawful, becauſe of the defect in his underſtanding; but the licenſe or authority of his guardian is a mark of his capacity; whence it is that in virtue thereof an infant is accounted the ſame as an adult. The illegality of the acts of a female or male ſlave is founded on a regard to the right of the owner;—for if their acts (ſuch as purchaſe and ſale) were valid and efficient, they would be liable to debt, and their creditors might appropriate their acquiſitions, or even ſell their perſons for the diſcharge of their demands, whence the maſter's advantage would be defeated. If, however, the maſter ſignify his aſſent to their acts, he thereby agrees to the deſtruction of his right. With reſpect to the acts of a *lunatic*, they are not lawful under any circumſtance, as he is utterly incompetent to act at all, although his guardian ſhould agree to his ſo doing. It is otherwiſe with reſpect to a ſlave or an infant; for a ſlave is poſſeſſed of perſonal competency, and there is hope of an infant in due time attaining that competency,—whence there is an evident difference between thoſe and lunatics.

whence purchaſe or ſale by them requires the aſſent of their immediate ſuperior:

IF a ſlave, an infant, or a lunatic, ſhould ſell or purchaſe any article, knowing at the time the nature of purchaſe and ſale, and intending one or other of thoſe, the guardian, or other immediate ſuperior, has it at his option either to give his aſſent if he ſee it adviſeable, or to annul the bargain; becauſe, as the controul and ſuſpenſion with regard to the acts of a ſlave are on account of the right of his maſter, it follows that he has an option with reſpect to them; and as the ſame controul and ſuſpenſion as to the acts of an infant or a lunatic are with a view to the ſecurity of their intereſt, their guardians are therefore to examine and attend to what may be good for them in their acts. It is requiſite, moreover, that the perſons here deſcribed know the nature of ſale, in order that the pillar of the contract may exiſt, and the ſale be concluded ſo far as to remain ſuſpended upon the guardian's conſent;—and a lunatic ſometimes knows the nature of ſale, and deſigns it, although he be incapable of diſtinguiſhing between the profit and loſs attending it.—(A lunatic of this deſcription is termed a *Matooá*;—and his agency is likewiſe valid,—as has been already mentioned in treating of agency.)

---

* Arab. *teſurrif*, meaning *tranſactions* of any kind; ſuch as purchaſe, ſale, or ſo forth.

Objection.—Suſpenſe obtains only in ſale; the original rule in purchaſe being that it takes effect upon the agent*: but in the preſent inſtance, *purchaſe*, by an infant or a lunatic depends upon the aſſent of the guardian, in the ſame manner as *ſale* by them.

Reply.—The non-ſuſpence of purchaſe is only where its taking effect upon the agent is poſſible, as in the caſe of purchaſe by a *Fazoolee*, or unauthorized perſon: but in the caſe in queſtion it is impoſſible that the purchaſe ſhould take effect upon the agent, becauſe of his incompetency where he is an infant or a lunatic, and becauſe of the injury to the maſter where he is a ſlave.—*Purchaſe* by them, therefore, is alſo ſuſpended.

but it operates upon them with reſpect to

—It is to be obſerved that the three diſqualifications in queſtion, namely infancy, inſanity, and ſervitude, occaſion inhibition with reſpect to *words*, but not with reſpect to *acts*†; becauſe acts, upon proceeding from the actor, are exiſtent and perceptible, whereas mere *words*, ſuch as purchaſe, ſale, and ſo forth, are accounted exiſtent only where they are of lawful force and authority, which depends upon the *deſign* of them, a thing which, in the caſe of infants and lunatics, is not regarded, becauſe of their want of underſtanding; nor in the caſe of ſlaves, becauſe of the injury to their maſter.—In ſhort, the diſqualifications here conſidered occaſion inhibition with reſpect to *ſpeech*, but not with reſpect to *actions*;—unleſs, however, thoſe be of ſuch a nature as to induce an effect liable to prevention from the exiſtence of a doubt, ſuch as puniſhment or retaliation, in which caſe infancy or lunacy occaſion inhibition; whence it is that infants or lunatics are not liable to puniſhment or retaliation, ſince no regard is paid to their deſign.

---

* Arab. *Mobáſhir*; meaning the *actor* or *performer* of any thing; whence, in treating of crimes, it is tranſlated the *perpetrator*. (The tranſlator thinks it is proper to explain this diſtinction, becauſe of the equivocal nature of the term *agent*.)

† Arab. *Iſyál*. Meaning *overt* acts, ſuch as a deſtruction of property, and ſo forth.

words only, not with reſpect to *acts*.

No contract entered into, nor acknowledgment made by an infant or lunatic is valid, for the reaſons before aſſigned;—and, in the ſame manner, divorce or manumiſſion pronounced by them does not take place, the prophet having ſaid, "*every divorce takes place except that "pronounced by an infant.*"—It is to be obſerved, moreover, that manumiſſion is peculiarly prejudicial:—and an infant does not underſtand the nature of divorce, as not being capable of deſire; and his guardian cannot poſſibly know whether the infant and his wife may not agree together after he attains maturity.—Hence the divorce or manumiſſion pronounced by an infant are not ſuſpended, in their effect, upon the conſent of the guardian. If, alſo, the guardian himſelf pronounce a divorce upon the infant's wife, or grant manumiſſion to his ſlave, it does not take place:—in oppoſition to other acts, ſuch as purchaſe, ſale, and ſo forth.

All contracts or acknowledgments by an infant or lunatic are invalid; and ſo likewiſe divorce or manumiſſion pronounced by them;

or by their guardians on their behalf.

IF an infant or a lunatic deſtroy any thing, they are liable to make a recompence, in order that the right of the owner may be preſerved. The ground of this is that deſtruction occaſions reſponſibility, independant of the intention or deſign;—as where, for inſtance, a man's

They are reſponſible for deſtruction of property.

property is deſtroyed, from being fallen upon by a perſon walking in his ſleep, or from the falling of an inclined wall, after due warning; in which caſes the ſleeper or the owner of the wall are reſponſible, although they did not *deſign* the deſtruction.

Acknowledgment by a ſlave affects *himſelf*, not his *maſter*; and takes effect upon him on his becoming free,

An acknowledgment made by a ſlave is efficient with reſpect to the ſlave himſelf, becauſe of his competency; but it is inefficient with reſpect to his maſter, from tenderneſs to his right; for if he were liable to be affected by it, the debt or obligation contracted by the ſlave's acknowledgment would attach to his [the ſlave's] perſon or to his acquiſitions, which would be deſtructive of his [the maſter's] property.—If, therefore, a ſlave make an acknowledgment concerning property, ſuch property is obligatory upon him after he ſhall become free; becauſe a ſlave is in himſelf competent to make a valid acknowledgment, the validity of which is however obſtructed by the right of his maſter; but that right is extinguiſhed upon his becoming free, and conſequently the obſtruction then ceaſes to exiſt.

or on the inſtant, if it induce puniſhment or retaliation.

If a ſlave make an acknowledgment inducing puniſhment or retaliation, thoſe are executed upon him on the inſtant, ſince he is accounted free with reſpect to his *blood*, whence it is that his maſter's acknowledgment affecting his blood is not admitted.

Divorce pronounced by him is valid.

Divorce pronounced by a ſlave is valid and efficient, becauſe of the ſaying of [the prophet] before quoted, and alſo becauſe the prophet has ſaid, "*a ſlave and a* MOKÂTIB *are not maſters of any thing* "*except divorce.*"—Beſides, as a ſlave knows what is adviſeable for him with regard to divorcing his wife, he is therefore competent to that act. His maſter's right of property in him, moreover, or the advantage he derives from his ſervices, are not liable to be thereby loſt or defeated.—Divorce by a ſlave is therefore lawful and effectual.

CHAP.

Digitized by Google

CHAP. II.

Of Inhibition from Weakneſs of Mind[*].

Inhibition, with reſpect to a *prodigal*,

HANEEFA has declared it as his opinion that there is no inhibition upon a freeman who is ſane and adult, notwithſtanding he be a prodigal[†]; and alſo, that the acts of ſuch a perſon, with regard to his property, are valid, although he be one of an extravagant and careleſs diſpoſition, who throws away his property on objects in which neither his intereſt nor his inclination are concerned. A *prodigal* [*Safeeyá*] ſignifies one who in conſequence of a levity of underſtanding acts merely from the impulſe of the moment, in oppoſition to the dictates of the LAW and of common ſenſe.—*Aboo Yooſaf*, *Mohammed*, and *Shafeï*, maintain that a prodigal is under inhibition, and is interdicted from acting with his own property, as he expends his ſubſtance idly, and in a manner repugnant to the dictates of reaſon. Hence he is placed under inhibition, for his own advantage, becauſe of the analogy between him and an infant:—nay, he is to be inhibited rather than an infant, ſince in an infant careleſſneſs and extravagance are only to be *apprehended*, whereas in him they are *certain*,—whence it is that he is not entruſted with the care of his own property. Beſides, if he were not under inhibition, there would be no advantage in withholding his property, ſince in ſuch caſe he might ſtill deſtroy what is kept from him, by his words or declarations. The argument of *Haneefa* is that as a prodigal is ſtill ſuppoſed to be a perſon *naturally* endowed with ſenſe and underſtanding, as much as one who acts diſcreetly, he therefore is not ſubject to inhibition any more than a *prudent* perſon. The ground of this is, that if the prodigal were ſubject to inhibition, (that is, if his power of acting were doubted,) he would be excluded from humanity, and connected with brutes, an excluſion ſtill more injurious to him than any extravagance of which he could be guilty; and to remedy the ſmaller evil by the greater would be abſurd. If, however, in laying an inhibition upon a freeman who is ſane and adult any *general* evil be remedied, (ſuch as in diſqualifying an unſkilful phyſician, or a profligate magiſtrate, or a mendicant impoſtor,) the inhibition is lawful, (according to what is reported from *Haneefa*,) ſince in this inſtance the ſmaller evil is uſed to remedy the greater, which is juſt and reaſonable. With reſpect to the argument for inhibition upon a prodigal, from the circumſtance of his not being entruſted with his own property, it is not admitted, ſince inhibition is a ſtill greater hardſhip upon him than withholding his property; for the legality of the *ſmaller* hardſhip does not prove the *greater* hardſhip to be legal. In the ſame manner, alſo, the analogy adduced between a prodigal and an *infant* is not admitted, ſince an infant is incapable of purſuing his own advantage, whereas a prodigal is capable of ſo doing. Beſides, although in ſubjecting the prodigal to inhibition his intereſt and advantage be conſulted, ſtill, however, the LAW exhibits in one particular a tenderneſs towards him, by enabling him to purſue his own advantage, which he acts contrary to only from the vice or folly of his diſpoſition. In withholding his property from him, moreover, there is one particular advantage; for the diſſipation of property by extravagance chiefly conſiſts in making idle and unneceſſary donations; and as his making theſe muſt depend upon the property being in his hands,

---

[*] Arab. *Fiſád*; meaning (in this place) any ſpecies of mental depravity, (not occaſioned by a defect of underſtanding,) or the practice of any folly, ſuch as *extravagance*, or ſo forth.

[†] Arab. *Safeeya*. According to the lexicons it ſignifies *light-minded*. *Prodigal* may appear, in many places, to be rather too *harſh* a term. The word might more literally be rendered *indiſcreet*, it being frequently oppoſed, in the ſequel, to *Raſheed*, a *diſcreet* perſon. As, however, the tranſlator does not recollect any ſubſtantive in our language perfectly correſpondent with this idea, he has thought it adviſeable to adopt that term which moſt nearly anſwers to the definition of the *Muſſulman* doctors, although it be not preciſely what he could wiſh.

Digitized by Google

hands, there is therefore an evident advantage in detaining it from him.

may be impoſed by one magiſtrate, and removed by another.

IF a magiſtrate lay an inhibition upon a prodigal, and the matter be referred to another magiſtrate, and he annul the inhibition, and leave the prodigal at full liberty, it is lawful; for the inhibition impoſed by the former magiſtrate is merely an *opinion*, [*Fitwa*,] not a *decree*, ſince to a judicial decree a plaintiff and a defendant are requiſite, and thoſe do not exiſt in the preſent inſtance. Beſides, if the act of the magiſtrate, in thus impoſing an inhibition, be conſidered as a *decree*, there is a difference concerning its being actually ſuch, as *Haneefa* is not of this opinion. It is, however, incumbent upon the ſecond magiſtrate, in this inſtance, to maintain the virtue of the ſentence [of inhibition,] in order that it may continue in force;—and accordingly, if the prodigal perform any act after inhibition, and the act in queſtion be referred to the magiſtrate who impoſed the inhibition, (or to any other,) and this magiſtrate iſſue a decree annulling ſuch act, and again the matter be referred to *another* magiſtrate, he is bound to uphold and adhere to the ſentence of the firſt magiſtrate, and not to annul it; for as the firſt or other magiſtrate, upon the matter being referred to them, had confirmed and ſubſcribed to the ſentence of inhibition, it cannot afterwards be reverſed.

The property of a prodigal youth muſt be withheld from him until he attain twenty-five years of age:

HANEEFA has delivered it as his opinion, that if an infant be a prodigal at the time of his attaining maturity, his property muſt not be delivered to him until he be twenty-five years of age:—(ſtill, however, if he ſhould perform any act with reſpect to his property prior to that period, it takes effect, ſince, according to *Haneefa*, prodigals are not liable to inhibition:)—but upon compleating his twenty-fifth year, his property muſt be delivered to him, although his diſcretion ſhould not be aſcertained. The two diſciples maintain that his property muſt not be delivered to him until ſuch time as his diſcretion be fully known; and that in the interim all acts performed by him are invalid; for as mental imbecility is the occaſion of the obſtacle to his power of action, it follows that the obſtacle continues as long as the occaſion of it remains;—as in the caſe of an infant, who remains ſubject to inhibition during the continuance of his infancy. The argument of *Haneefa* is that withholding the property from the perſon in queſtion is intended to operate merely as inſtruction or as a ſpecies of diſcipline; and it is moſt probable that a perſon, after attaining the age mentioned, will not be diſpoſed to receive inſtruction, ſince it frequently happens that a man arrived at thoſe years is a grandfather, his ſon having a ſon born to him: hence in withholding his property there is no advantage whatever, ſince the view in withholding it is to make him ſubmit to inſtruction, which upon his attaining the age mentioned can no longer be anſwered;—and it is therefore indiſpenſable that his property be delivered to him. Beſides, the reaſon for withholding his property from the perſon in queſtion after he has attained maturity, is in conſideration of the veſtiges or remaining impreſſions of infancy;—and as theſe continue only in the beginning of maturity, and are terminated by time, it follows that upon a time paſſing ſufficient for this purpoſe, his property muſt be delivered to him;—whence *Haneefa* maintains that if an infant be diſcreet at the time of his majority, and afterwards become prodigal, ſtill his property muſt be delivered to him, ſince the prodigality, in this inſtance, cannot be regarded as a veſtige of infancy. It is to be obſerved that as, according to the tenets of the two diſciples, an inhibition upon the prodigal in queſtion is valid, it follows that a *ſale* concluded by him is of no effect, in order that the advantage propoſed in the inhibition may be obtained. If, however, the ſale be deemed adviſeable, the magiſtrate muſt give his aſſent to it; becauſe here the ſale poſſeſſes all the eſſentials of ſale, being ſuſpended in its effect merely for the advantage of the prodigal, and from a regard to his intereſt; and as the magiſtrate is appointed to his office for the purpoſe of watching over and conſulting the intereſt of the individual, it is therefore requiſite that he examine whether the ſale be adviſeable, in the ſame manner as it is his duty to inveſtigate into a ſale made by an infant who intends and is acquainted with the nature of ſale.

but a ſale concluded by him after maturity, and before inhibition, is valid;

IF the prodigal, conſidered in the preceding example, conclude a ſale before any inhibition has been laid upon him by the magiſtrate, ſuch ſale is valid, according to *Aboo Yooſaf*, ſince (agreeably to his tenets) to render the acts of the prodigal invalid, it is requiſite that the magiſtrate lay an inhibition upon him, in order that inhibition may be fully eſtabliſhed. According to *Mohammed*, on the contrary, the ſale in queſtion is unlawful, ſince (agreeably to his tenets) the prodigal is in fact under inhibition after majority, as the cauſe of inhibition, namely prodigality, ſtands in the place of infancy. The ſame difference of opinion obtains concerning an infant who is diſcreet at the time of attaining majority, and afterwards becomes prodigal.

and he may grant manumiſſion,

IF the prodigal in queſtion emancipate his ſlave, it is valid and effectual, and the ſlave becomes free, according to the two diſciples; whereas according to *Shafeï* it is not effectual. In ſhort, it is a rule with the two diſciples that every act liable to be affected by jeſting is alſo liable to be affected by inhibition, as (on the contrary) any act not affected by jeſting is not affected by inhibition; for a prodigal is, in effect, a jeſter, inaſmuch as the words of a jeſter, ſpoken to an unwiſe or abſurd effect, proceed from mere paſſion or waywardneſs, not from a want of underſtanding, and the ſame alſo of a prodigal; and as manumiſſion is one of thoſe things not affected by jeſting, but valid even when ſpoken in jeſt, ſo in the ſame manner manumiſſion pronounced by a *prodigal* is valid. With *Shafeï*, on the contrary, it is a rule that inhibition in conſequence of *prodigality* is in effect the ſame as inhibition in conſequence of *ſervitude*; (whence it is that after inhibition in conſequence of prodigality no act whatever of the prodigal is valid except divorce, which is effectual in the ſame manner as divorce pronounced by a ſlave;) and as manumiſſion by a *ſlave* is invalid, ſo in the ſame manner is manumiſſion by a prodigal. It is to be obſerved that as, according to the two diſciples, a manumiſſion pronounced by the prodigal is valid, the ſlave therefore owes to his maſter (the prodigal) emancipatory labour to the amount of his whole value; becauſe inhibition is laid upon the maſter with a view to his intereſt and advantage; and as the preſervation of his intereſt by a rejection of the manumiſſion itſelf is impoſſible, it muſt therefore be rejected ſo far as to ſubject the ſlave to emancipatory labour for his full value; in the ſame manner as holds in the caſe of inhibition with reſpect to a dying perſon; for if a dying perſon emancipate his ſlave, he [the ſlave] muſt perform emancipatory labour on behalf of the creditors, where the perſon was involved in debt, or on behalf of the heirs, for two thirds of his value, where he died free from debt. It is elſewhere recorded, from *Mohammed*, that emancipatory labour is not incumbent upon the ſlave thus emancipated by his maſter, being a prodigal; for, if it were due from him, it could only be ſo on behalf of the emancipator; and the LAW does not authorize the obligation of emancipatory labour on behalf of the *emancipator*, but of *others*.

or *Tadbeer*,

If the prodigal in queſtion conſtitute his ſlave a *Modabbir*, it is lawful; becauſe *Tadbeer* gives a *title* to manumiſſion; and as actual manumiſſion, proceeding from a prodigal, is valid, that which merely *entitles* to it is certainly valid.—Emancipatory labour, however, is not incumbent upon the *Modabbir* during the prodigal's life, ſince he ſtill continues his property. But if the prodigal die, without diſcretion having been aſcertained in him, the *Modabbir* is in that caſe to perform emancipatory labour [to the prodigal's heirs or creditors, as the caſe may be,] for the value he bore as a *Modabbir*; becauſe he becomes free upon his maſter's deceaſe, at which time he is a *Modabbir*, and the caſe is therefore the ſame as if the maſter had firſt conſtituted him a *Modabbir*, and then emancipated him.

IF the prodigal's female ſlave bring forth a child, and he claim it, the parentage is eſtabliſhed in him, and the child is free, and the mother becomes his *Am-Walid*; for as the prodigal has occaſion to make the claim in queſtion, with a view to poſterity, he is therefore accounted a *diſcreet* perſon with reſpect to the claim of offspring advanced by him.

or claim a child born of his female ſlave,

IF the prodigal's female ſlave be not in poſſeſſion of any child, and the prodigal avow her to be his *Am-Walid*, ſhe accordingly becomes his *Am-Walid*, to this effect, that he has it not in his power to ſell her. If, however, the prodigal die, ſhe muſt perform emancipatory labour [to his heirs or creditors] for her whole value; becauſe his avowal of her being *Am-Walid* is the ſame as his acknowledgment of her being free, ſince the child, which would be an evidence of her freedom, does not exiſt in this caſe; and as, if he had declared her to be free, ſhe would owe emancipatory labour, ſo likewiſe in the preſent inſtance. It is otherwiſe, in the example before ſtated, (where the child is ſuppoſed to be exiſting,) ſince in that caſe an evidence exiſts of the ſlave being free. Analogous to this example is the inſtance of a dying perſon laying claim to a child born of his female ſlave; for in that caſe alſo the ſame rules prevail.

or create his female ſlave *Am-Walid*, independant of ſuch claim.

IF the prodigal here treated of marry any woman, ſuch marriage is legal and valid; becauſe jeſting has no effect in matrimony; and alſo, becauſe marriage is one of his original indiſpenſable wants. If, alſo, he ſpecify any dower, it is valid to the amount of the woman's *proper* dower, as that is one of the pertinents of marriage; but any thing beyond the proper dower is null, ſince for that there is no occaſion, it being binding only in conſequence of ſpecification, which in this inſtance is no way advantageous to the prodigal:—the exceſs therefore is invalid, in the ſame manner as where a perſon affected with a mortal diſeaſe marries, and ſpecifies a dower greater than the *proper* dower. If, alſo, he divorce his wife before conſummation, an half

He may alſo marry.

half dower is due to the woman from his property, as his ſpecification of a dower is valid to the amount of the *proper* dower. In the ſame manner alſo, if he marry four wives, or a new wife every day, it is valid, for the reaſons above ſpecified.

Out of his property is paid *Zakât*; and alſo maintenance to his parents, children, &c.

ZAKÂT is levied upon the property of the prodigal in queſtion, as *Zakât* is incumbent upon him. In the ſame manner alſo, ſubſiſtence is provided to his parents and children, his wife or wives, and all relations who have a claim upon him for maintenance; becauſe the preſervation of his wife and children is among his eſſential wants, and maintenance is due to his relations by right of affinity; and no perſon's right is annulled by his prodigality. It is to be obſerved that it is the *Kázee*'s duty to give the amount or proportion of *Zakât* into the prodigal's hands, in order to his expending it upon the proper objects of *Zakât*; for as *Zakât* is a matter of piety, intention is therefore requiſite in the payment of it. The *Kázee* muſt, however, depute one of his *Ameens* to ſee that the *Zakât* be applied to its proper objects;—and in the caſe of maintenance to relations, he muſt pay the neceſſary ſum into the *Ameen*'s hands, that he may diſtribute the ſame among thoſe entitled to maintenance; for as this duty is not a matter of *piety*, the intention of the donor is not requiſite in the fulfilment of it. It is otherwiſe where the prodigal ſwears, or makes a votive engagement, or pronounces a *Zihâr* upon his wife; for in theſe caſes he does not forfeit any *property*, but has only to perform an expiation for his oath, vow, or *Zihâr*, by faſting, this expiation being incurred by his own act; and therefore if his performance of expiation by a payment of property were required, he would be allowed *himſelf* to expend his property to the degree neceſſary;—but it is not ſo where any thing is due from him *not* incurred by his own act, ſuch as *Zâkât*, and ſo forth.

He cannot be prevented from per-

IF the prodigal be deſirous of performing the ordained pilgrimage, he muſt not be prevented, ſince this is a matter rendered incumbent upon

Digitized by Google

forming pilgrimage.

upon him by a commandment of GOD, independant of any act on his part. The *Kâzee* muſt not, however, entruſt to him the ſum requiſite for his travelling expences, but muſt lodge it in the hands of ſome truſty perſon among the pilgrims, to provide him a maintenance out of it upon the journey; for otherwiſe he would throw it away, or expend it on ſomething not relating to pilgrimage.—In the ſame manner alſo, if the prodigal be deſirous of performing the *Amrit* *, he muſt not be prevented; for as concerning the obligation of that there is a difference of opinion, caution dictates that no obſtruction be offered to the obſervance of it.—In the ſame manner alſo, if he be deſirous of performing a *Kirân* †, he muſt not be prevented, ſince by *Kirân* is underſtood the performance of *Amrit* and pilgrimage ‡ in one journey; and as he is not prevented from performing thoſe ſeparately, it follows that he is not to be prevented from performing the whole in one journey.

His bequeſts (to pious purpoſes) hold good.

IF the prodigal fall ſick, and make a variety of bequeſts to pious and charitable purpoſes, they hold good to the amount of a third of his whole property; for rendering them valid is advantageous to him, ſince when the bequeſts take effect he has no longer any occaſion for the property; and thoſe bequeſts are uſed as a mean either of manifeſting the teſtator's gratitude to GOD, or of acquiring merit in his ſight.

There is no inhibition upon a *Fâſik*.

OUR doctors are of opinion that no inhibition is to be impoſed on a reprobate [*Fâſik*] with reſpect to his property, provided he be en-

---

* This is alſo pronounced *Omárá*. It applies to certain ceremonies uſed by the pilgrims at *Mecca*, namely, compaſſing the *Kàba*, or temple, ſeven times, and running between *Siffá Mirwá*, which muſt be performed before the viſitation to the temple: but concerning the *neceſſity* of thoſe obſervances there is a difference of opinion among the *Muſſulman* doctors.

† *Kirân* ſignifies performing the ceremonies of pilgrimage in company with others.

‡ As the *Amrit* is not regarded as an *eſſential* part of pilgrimage, that and the viſitation to the temple (properly termed the *pilgrimage*) are conſidered under different heads.

dowed

dowed with diſcretion;—and *original* or *ſupervenient* depravity of manners are alike as far as regards this rule. *Shafeï* maintains that inhibition is to be impoſed upon a perſon of this deſcription as a puniſhment, in the ſame manner as on a prodigal; whence it is that (according to him) an unjuſt perſon is incapable of exerciſing juriſdiction or bearing evidence.—The arguments of our doctors upon this point are twofold. FIRST, the word of GOD, in the KORAN, ſays "WHENEVER YE PERCEIVE THEM TO BE DISCREET, DELIVER TO "THEM THEIR PROPERTY;"—and the reprobate, in the caſe in queſtion, is ſuppoſed to be diſcreet with regard to the expenditure of his property. SECONDLY, a reprobate (according to our doctors) is competent to exerciſe authority, as being a *Muſſulman*, and is conſequently empowered to act with regard to his own property.

People are liable to inhibition from careleſſneſs in their affairs.

THE two diſciples allege that the *Kázee* is at liberty to lay an inhibition upon perſons on account of careleſſneſs or neglect in their concerns, although they be not *prodigal*. Their argument is that an inhibition impoſed upon a perſon of this deſcription is advantageous to him. *Shafeï* concurs with the two diſciples in this opinion.

SECTION.

Of the TIME *of attaining* PUBERTY*.

The puberty of a *boy* is eſtabliſhed by circumſtances, or

THE puberty of a boy is eſtabliſhed by his becoming ſubject to nocturnal emiſſion, his impregnating a woman, or emitting in the act of coition; and if none of theſe be known to exiſt, his puberty is not eſtabliſhed, upon his attaining eighteen years of age;—and that of a *girl*, by circumſtances, or upon her attaining ſeventeen years of age.

---

* *Puberty* and *majority* are, in the *Muſſulman* law, one and the ſame.

eſtabliſhed, until he have compleated his eighteenth year.—The puberty of a girl is eſtabliſhed by menſtruation, nocturnal emiſſion, or pregnancy; and if none of theſe have taken place, her puberty is eſtabliſhed on the completion of her ſeventeenth year. What is here advanced is according to *Haneefa.* The two diſciples maintain that upon either a boy or girl compleating the fifteenth year they are to be declared adult: there is alſo one report of *Haneefa* to the ſame effect; and *Shafeï* concurs in this opinion.—It is alſo reported, from *Haneefa*, that to eſtabliſh the puberty of a boy *nineteen* years are required.—Some, however, obſerve that by this is to be underſtood merely the completion of eighteen years and the commencement of the nineteenth; and conſequently, that this report perfectly accords with the other. Some, again, affirm that this is not the ſenſe in which the laſt report is to be received; for there have been other opinions reported from *Haneefa* on this point, different from that firſt recited as above; becauſe ſome authorities expreſsly ſay that (according to him) the puberty of a boy is not counted by years until he ſhall have compleated his nineteenth year. It is to be obſerved that the earlieſt period of puberty, with reſpect to a boy, is *twelve* years, and with reſpect to a girl, *nine* years.

Their declaration of their own puberty, at a probable ſeaſon, muſt be credited.

WHEN a boy or girl approaches the age of puberty, and they declare themſelves adult, their declaration muſt be credited, and they become ſubject to all the rules affecting adults; becauſe the attainment of puberty is a matter which can only be aſcertained by their teſtimony; and conſequently, when they notify it, their notification muſt be credited, in the ſame manner as the declaration of a woman with reſpect to her courſes.

CHAP. III.

Of Inhibition on account of Debt.

A debtor is not liable to inhibition;

nor can his property be made the ſubject of any tranſaction:

but he may be impriſoned.

Haneefa is of opinion that no perſon can be laid under inhibition on account of debt. If, therefore, a debt be proved againſt any perſon, and the creditors require the *Kâzee* to impriſon him and lay him under inhibition, ſtill the *Kâzee* muſt not do the latter; becauſe as laying him under inhibition is a deſtruction or ſuſpenſion of his competency, it is not therefore allowable for the remedy or removal of a particular injury. If, alſo, the debtor be poſſeſſed of property, ſtill the *Kâzee* is not at liberty to perform any act with it*, as this would be a ſpecies of inhibition, and his thus acting with the property would, moreover, be an act of converſion without the aſſent of the proprietor, and conſequently null, according both to the Koran and the *Sonna*. It is, however, requiſite that the magiſtrate impriſon the debtor, and hold him in durance, until ſuch time as he ſell his property for the diſcharge of his debts, and the rendering of juſtice. The two diſciples ſay, that if the creditors require the *Kázee* to impoſe an inhibition upon their inſolvent debtor, it is requiſite that he impoſe an inhibition upon him accordingly, and prevent him from ſelling, or tranſacting, or making acknowledgments, in order that his creditors may not ſuſtain an injury; becauſe reſtriction is impoſed upon a *prodigal* only out of a regard for his intereſt; and in impoſing the ſame upon a debtor a regard is manifeſted to the intereſt of his creditors; for if an inhibition upon him were not authorized, it is not improbable that he might act colluſively, or, in other words, might declare that "the property in his poſſeſſion belong to a particular perſon," notwithſtanding it actually belongs to himſelf and not to the other, his declaration being made merely with a view that the property might not go to his creditors,—whence the right of the creditors would be defeated.—(It is to be remarked, that what the two diſciples ſay of an inhibition being laid upon the debtor with reſpect to *ſale*, applies only to the ſale of any thing for a price ſhort of its real value; as the right of the creditors is not injured by his ſelling an article for an adequate price. Beſides, the prohibition of the ſale exiſts only on account of the creditors' right; and as their right is not annulled by ſuch a ſale, he need not be prohibited from concluding it.)—It is alſo lawful (according to the two diſciples) for the *Kâzee* to ſell the debtor's property, where he himſelf declines ſo doing, and to divide the price of it among the creditors in proportion to their reſpective claims; becauſe it is incumbent upon the debtor to ſell his property for the payment of his debt; and conſequently, upon his declining ſo to do, the *Kâzee* is his ſubſtitute for that purpoſe, in the ſame manner as a *Kâzee* is the ſubſtitute of the huſband for pronouncing a ſeparation between him and his wife, where he is an eunuch, or impotent. The argument adduced by our doctors on behalf of *Haneefa*, and in reply to the two diſciples, is that *colluſion* is a matter of uncertainty. And with reſpect to *ſale*, it is not to be particularly appointed for the payment of debts, ſince it is in the debtor's power to diſcharge what he owes by various other means, ſuch as borrowing or begging; whence it is not lawful for the *Kâzee* to appoint a ſale. It is otherwiſe in the caſe of a huſband who is an eunuch or impotent, as in that inſtance ſeparation is the appointed remedy. The debtor, moreover, is not impriſoned with a view to *ſale*, (as alleged by the two diſciples,) but with a view to the payment of his debts, and to conſtrain him to adopt ſome method for the diſcharge of them.—Beſides, if it were lawful for the *Kâzee* to ſet up the debtor's property to ſale, he could not lawfully have recourſe to impriſonment, ſince that would be injurious both to the debtor and the creditors, as being vexatious to the former, and creating a delay in the diſcharge of the latter's right, whence the impriſonment would not be ſanctioned by the LAW;—whereas it is in fact ſtrictly lawful.

---

* That is, to *purchaſe*, or *ſell* with it, &c.

If he be poſſeſſed of money, of the ſame denomination as his debt, the *Kâzee* may make payment with it; or, if the ſpecies be different, he may ſell it for this purpoſe.

If the debts owing by the debtor in queſtion conſiſt of *dirms*, and the property poſſeſſed by the debtor alſo conſiſt of *dirms*, the *Kâzee* may in this caſe diſcharge the demands upon him without his conſent. This is a point in which all our doctors coincide; for as the creditor is here at liberty to take his right without the debtor's conſent, it follows that the *Kâzee* is at liberty to aſſiſt him in the recovery of it. If, on the contrary, the debt conſiſt of *dirms*, and the property in the debtor's hands be *deenars*, or *vice verſa*, the *Kâzee* is in this caſe empowered to ſell ſuch property for payment of the debt. This is according to *Haneefa*, and proceeds upon a favourable conſtruction.—Analogy would ſuggeſt that the *Kâzee* is not at liberty to ſell the property in this inſtance, in the ſame manner as he is not at liberty to ſell the debtor's houſehold goods, or other effects. The reaſon, however, for a more favourable conſtruction of the LAW, in this particular, is that *dirms* and *deenars* are both alike with regard to their conſtituting price and repreſenting property, as, on the other hand, they differ from each other with regard to appearance: hence, becauſe of their ſimilarity in the one ſhape, the *Kâzee* is empowered to act with reſpect to them; and becauſe of their *diſ*-ſimilarity in the other ſhape, the creditor is not at liberty to take them without the debtor's conſent. It is otherwiſe with reſpect to goods and effects, ſince thoſe are objects of deſire and uſe, both in appearance and reality, whereas *dirms* and *deenars* are merely a means of obtaining ſuch objects.

Rule in ſelling off a

In diſcharging debts, that part of the debtor's property which conſiſts of money* is firſt diſpoſed of, then his effects and houſehold furniture; and laſt of all his houſes and lands; for in this mode of adjuſtment a regard is paid to the eaſe and convenience of both parties. The debtor's clothes, alſo, muſt be ſold, excepting only one ſuit, which is ſufficient to anſwer neceſſity. Some, however, ſay that *two* ſuits muſt be left with the debtor, one ſuit being in uſe whilſt the other is waſhing.

debtor's property.

IF a debtor make an acknowledgment whilſt under inhibition†, ſuch acknowledgment is not binding upon him until he ſhall have ſatisfied his creditors; for as their right was firſt connected with his property, he is therefore not at liberty to annul it by an acknowledgment in behalf of any other perſon. It would be otherwiſe ſuppoſing the debtor to *deſtroy* a perſon's property; for in that caſe he would be reſponſible, and the owner of the property ſo deſtroyed would come in upon an equal footing with the other creditors, as the deſtruction of property is a ſenſible and perceptible circumſtance, and therefore cannot poſſibly be ſet aſide. If, alſo, the debtor acquire or obtain property after inhibition, his acknowledgment, as above, takes effect with reſpect to ſuch property; becauſe the right of the former creditors is not connected with this property, it not exiſting at the time of inhibition.

Acknowledgments by a debtor are not binding on him until his debts be paid.

A SUBSISTENCE muſt be paid to the debtor out of his property, (provided he be in poverty,) and alſo to his wives, infant children, and uterine kindred; becauſe his indiſpenſable wants precede the right of his creditors; and alſo becauſe, as the maintenance of his wife, &c. is their right, it cannot be annulled by inhibition, whence it is that

A debtor (being poor) gets a ſubſiſtence out of his property; and alſo his wives,

---

* Arab. *Nakd*, which literally ſignifies *caſh*, but in this place comprehends all ſorts of property which come under the denomination of *Mâl*, as oppoſed to *Rakht* and *Matta* [goods and effects.]

† Proceeding on the idea of the two diſciples, that "he *may* be put under inhibition."

if

children, and uterine kindred.

if he were to marry, his wife comes in upon an equal footing with his other creditors, to the amount of her proper dower.

A debtor, on pleading poverty, is impriſoned.

If the debtor be not poſſeſſed of any known property, and the creditors require the *Kázee* to impriſon him, he at the ſame time declaring that "he has nothing," the *Kázee* muſt in this caſe impriſon him on account of ſuch debts as he may have incurred by *contracts*, ſuch as a *dower*, or an obligation undertaken by his becoming bail for property.—(Thoſe caſes have been already diſcuſſed at large in treating of the duties of the *Kázee*, and therefore a repetition in this place is unneceſſary.)

General rules with reſpect to him whilſt in priſon.

If the debtor who pleads poverty, as above, fall ſick in priſon, he is nevertheleſs continued in durance, provided he have an attendant to wait upon him and adminiſter medicine to him:—but if he have no ſuch attendant, he muſt in that caſe be liberated from confinement, leſt he periſh. If he be an artizan, he muſt be prevented from following his trade, and muſt not be ſuffered to do any work, in order that, from diſtreſs, he may be compelled to pay his debts *.—This is approved. If he be poſſeſſed of a female ſlave, under ſuch circumſtances as that he may cohabit with her †, he muſt not be prevented from ſo doing; ſince carnal connexion is required to ſatisfy a man's appetite in the ſame manner as eating or drinking; and he therefore muſt not be prevented from indulging himſelf in this, any more than from eating or drinking. Upon his being liberated from priſon ‡, the creditors muſt not be obſtructed in enforcing their claims againſt him,

After liberation, the creditors are

---

* This, at firſt ſight, does not appear conſiſtent with the tenderneſs exhibited towards a debtor in other inſtances. It is to be recollected, however, that the debtor in queſtion is impriſoned on ſuſpicion of his being poſſeſſed of property, which he denies.

† That is, under ſuch circumſtances as make her *lawful* to him.

‡ In conſequence of the *Kázee* paſſing a decree of inſolvency in his behalf.

Digitized by Google

but are at liberty to purſue him[*]. They muſt not, however, prevent him from tranſacting buſineſs or travelling. The reaſon of this is that the prophet has ſaid, "*the proprietor of a right has a hand and* "*a tongue*," meaning, by the *hand*, the power of purſuing, and by the *tongue*, the power of demanding the right. The creditors are alſo at liberty, in this caſe, to take the exceſs[†] of the debtor's earnings, and divide it among themſelves in proportion to their reſpective claims; for as their right is equal with regard to power, attention muſt be paid equally to that of each. The two diſciples maintain that upon the *Kâzee* declaring the debtor's poverty [inſolvency] the creditors muſt be obſtructed, (that is, muſt be prevented from purſuing the debtor,) unleſs they adduce evidence to prove his being poſſeſſed of property; for as (according to them) the *Kâzee*'s decree of poverty on behalf of the debtor is valid, his inability to diſcharge his debts is thereby fully eſtabliſhed, and this being the caſe, he is entitled to an indulgence until he may acquire property, and thereby become ſolvent. According to *Haneefa*, on the contrary, the *Kâzee*'s decree of poverty on behalf of the debtor is not valid; becauſe property comes in the morning and goes in the evening. Beſides, as witneſſes poſſeſs a knowledge of property only with regard to appearance, evidence therefore, although it be proof ſufficient to releaſe the debtor from priſon, is yet not proof ſufficient to annul the right of the creditors, that is, their title to purſue the debtor. With reſpect to the exception ſtated in relating the opinion of the two diſciples, that "the creditors "muſt not be obſtructed *unleſs they adduce evidence to prove the debtor's* "*being poſſeſſed of property*," it is an argument that evidence of *wealth* at liberty to purſue him;

---

[*] Arab. *Molàzimat*, meaning a continual perſonal attendance upon or watch over him. This is a cuſtomary mode of proceeding, with reſpect to debtors, among all *Muſſulmans*, and is termed, in *Perſia* and *Hindoſtan*, *Nazr-band*, which may be rendered *holding in ſight*.

[†] Meaning any balance which may remain after the maintenance of the debtor and his family.

has a preference over evidence of *poverty*; becauſe the former tends to prove new matter, ſince the poſſeſſion or acquiſition of wealth is ſupervenient, whereas indigence is original. With reſpect, on the other hand, to what has been ſaid, in ſpeaking of the right of purſuing, &c. that creditors "muſt not prevent the debtor from tranſ-"acting buſineſs, or travelling," it is an argument that the creditor is at liberty to purſue the debtor by accompanying him wherever he goes, but not by fixing him in any particular place; for this would be *impriſonment*. If, alſo, the debtor go into his houſe upon any buſineſs, the creditor is not at liberty to enter with him, but muſt ſtand at the door until he come forth; becauſe men ſtand in need of ſome private and ſecluded place.

and have an option, if he prefer continuing in priſon.

If a debtor be deſirous of continuing in priſon, and his creditor be rather deſirous of holding him in purſuit, regard is paid to the option of the creditor, as that is the moſt effectual towards obtaining the deſired end, ſince he, it is to be ſuppoſed, will adopt ſuch meaſures as may diſtreſs the debtor, and thus compel him to do juſtice. If, however, the *Kázee* perceive that the debtor is ſubjected to any particular injury, (from the creditor in the exerciſe of the right of purſuing, as, for inſtance, not permitting him to enter his own houſe,) in this caſe he [the *Kázee*] muſt impriſon him [the debtor,] in order to repel ſuch injury.

A male creditor cannot purſue his female debtor.

If the debtor be a woman, and the creditor a man, the creditor muſt not be ſuffered to purſue her, ſince if this were admitted, it would induce the retirement of a man with a ſtrange woman. The creditor, however, is at liberty to depute a confidential *female* to attend the debtor in the exerciſe of his right.

Caſe of a purchaſed article

If a debtor become poor *, having at the ſame time in his hands effects purchaſed from a particular perſon, this perſon, in recovering the price of ſuch effects, is upon an equal footing with the other creditors. *Shafeï* maintains that in this caſe it is the duty of the *Kâzee* to lay an inhibition upon the purchaſer, provided the ſeller require him ſo to do; and then that the ſeller has it at his option to diſſolve the ſale; for the purchaſer has become incapable of paying the price; and this occaſions a right of diſſolution, in the ſame manner as the inability of the ſeller to deliver the article ſold. The ground of this is that ſale is a contract of exchange, which requires perfect equality;—in the ſame manner as a contract of *Sillim*; in other words, if the perſon who receives the advance, in a contract of *Sillim*, be incapable of delivering the article advanced for, (from its not being procurable, for inſtance,) the advancer has it at his option either to wait until the other may procure the article, or to diſſolve the contract and take back what he had advanced;—and ſo likewiſe in the preſent inſtance. The argument of our doctors is that poverty occaſions an inability to make a ſpecific delivery *. In the caſe in queſtion, however, the purchaſer is not under any obligation to make a ſpecific delivery, but merely to make a delivery of the *price* [of the article purchaſed,] which is a debt upon him. Hence the ſeller is not endowed with a right of diſſolution in conſequence of the purchaſer's inability to make ſuch ſpecific delivery.

---

* This, in effect, ſignifies the ſame as *failing*, or *becoming bankrupt*.

being in the debtor's hands upon his failure.

OBJECTION.—If debt in general be obligatory upon the purchaſer, and not a *particular ſubſtance*, it would follow that the purchaſer is not diſcharged of the demand by his giving money, and the ſeller taking poſſeſſion of it, ſince *ſubſtance* is different from *debt*.

REPLY.—By the ſeller taking poſſeſſion of the particular money, a ſubſtitution is eſtabliſhed between this ſubſtance and the debt owing by the purchaſer; and as this is the original object in paying debts, regard muſt therefore be had to it, unleſs that be impoſſible, which however is not the caſe in the example here conſidered.—It is otherwiſe in a contract of *Sillim*; for there no regard can be paid to ſubſtitution, as it cannot there be admitted;—whence it is that, in contracts of *Sillim*, the ſubſtance, or particular ſum taken poſſeſſion of, is accounted to be, in effect, the thing for which the advance is made, and which remains a debt upon the perſon who receives ſuch ſum.

---

* Arab. *Ain*, meaning (in this place) the particular ſum of money owing to the ſeller. It is proper here to obſerve that the Arabian lawyers make an eſſential diſtinction between *debt* and *ſubſtance*, the former being conſidered as merely ideal, until it be realized.

Digitized by Google

HEDAYA.

BOOK XXXVI.

Of MAZOONS, or LICENCED SLAVES*.

Definition of the term; and introductory remarks.

MAZOON is the paſſive participle from *Izn.*—*Izn,* in its primitive ſenſe, means certification.—In the language of the LAW it ſignifies a removal of the inhibition to which a ſlave is ſubjected by his bondage, and alſo (according to our doctors) a remiſſion of the maſter's right;—and, upon this taking place, the licenced [*Mazoon*] ſlave

---

* They are in ſome parts of the work termed *privileged* ſlaves.—The expreſſions are ſtrictly ſynonymous, the term *Mazoon* applying to either.—In fact, *Mazoon* literally ſignifies *licenced,* and therefore applies to any licenced perſon whatever:—but it is alſo the technical term for *a licenced ſlave,* and where it occurs by itſelf is always to be taken in that ſenſe.

Digitized by Google

ſlave is empowered to act for himſelf, in virtue of his own competency; becauſe a ſlave, even during his bondage, is endowed with a natural capacity for acting, as poſſeſſing the gift of ſpeech and a diſcriminating underſtanding.—Beſides, he was inhibited, and prevented from acting, merely on account of his maſter's right; for as his acts were known and acknowledged by the LAW, only inaſmuch as they were the means of ſubjecting to debt his perſon or acquiſitions, which are his maſter's property, the maſter's aſſent to what he did was therefore requiſite, in order that his rights might not be rendered null without his will.—As, however, the tranſactions of a *licenced* ſlave are carried on by him independantly, in virtue of his own inherent competency, and not by delegation from his maſter, hence any obligations he may incur are not exacted from the maſter.—As, alſo, the licence is a remiſſion of the maſter's right, it therefore cannot be made temporary or reſtricted; and hence if a perſon grant a licence to his ſlave for *one day*, or *one month*, ſuch ſlave becomes licenced perpetually, or until the maſter lay an inhibition upon him, as the maſter's remiſſion of his right cannot be reſtricted to any particular time.—It is proper to obſerve that, in the ſame manner as *Izn*, or licence, is eſtabliſhed by an expreſs declaration, ſo alſo is it eſtabliſhed by inference; as where, for inſtance, a perſon ſees his ſlave tranſacting purchaſe or ſale, and knowing and perceiving him to be thus employed, he notwithſtanding remains ſilent,—in which caſe the ſlave becomes *Mazoon*, or licenced, according to our doctors; (contrary to the opinions of *Ziffer* and *Shafeï*;) and it makes no difference, in this caſe, whether the ſlave be employed in ſelling the property of his maſter, or that of any other perſon, with or without his conſent,—or whether the ſale be valid or invalid,—for every perſon who ſees the ſlave thus employed will, from appearances, conclude that he is licenced with regard to purchaſe and ſale, ſince otherwiſe his maſter would certainly prevent him;—conſequently, people will tranſact buſineſs with him without heſitation; and, if he were not licenced,

cenced, they would ſuſtain an injury on his becoming indebted to them *.

An unlimited licence of trade extends to every ſpecies of commerce.

If a perſon give his ſlave an unlimited licence to trade, by ſaying to him "I permit you to trade," without reſtricting the permiſſion to any particular ſpecies of traffic, in this caſe his tranſactions are lawful and valid in all deſcriptions of commerce, the term trade [*tajàrit*] comprehending all ſorts of mercantile concerns.—It is therefore lawful for him to purchaſe or ſell whatever he pleaſes of goods or effects, as this is the original mode of conducting trade. He may alſo purchaſe or ſell at any inconſiderable diſadvantage, as this cannot always be guarded againſt. In the ſame manner alſo, ſale by him at a *great* diſadvantage is valid, according to *Haneefa*. The two diſciples hold that he cannot lawfully ſell any thing to a great diſadvantage, becauſe ſale at a great loſs is in fact the ſame as a gratuity,—whence it is that if a dying perſon ſell any thing at a very conſiderable diſadvantage, the loſs can affect only one third of his property. The licence, therefore, granted to a ſlave to purchaſe or ſell does not include purchaſe or ſale at a very diſproportionate and manifeſt loſs, ſince he is not at liberty to perform gratuitous acts. The argument of *Haneefa* is, that ſale at any diſadvantage, whether great or inconſiderable, is an act of commerce; and the ſlave in queſtion, moreover, acts in virtue of his own inherent competency, in the ſame manner as a freeman.—The ſame difference of opinion alſo obtains concerning a licenced *infant*.

Caſe of *Mobabât* ſale

If a licenced ſlave tranſact a *Mobabât* ſale upon his deathbed, it extends to and affects the whole of his property, where there are by a licenced ſlave.

---

* Becauſe in this caſe they would have no means of recovering their right;—for if the ſlave be ſuppoſed to act without his maſter's concurrence, the maſter cannot be reſponſible for ſuch debts as may be incurred by him;—or if, on the other hand, he be not ſuppoſed *licenced*, his perſon or property cannot be attached.

are no debts againſt him;—or if he be in debt, it extends to the whole of what remains after diſcharging his debts;—becauſe its effect would be reſtricted to one third of his property only on account of his heirs; but a licenced ſlave has no heirs.—If his debts involve the whole of his property in his poſſeſſion, the purchaſer muſt in this caſe be deſired either to make good the whole conſideration of *Mohabât*, or to diſſolve the ſale,—in the ſame manner as holds in the caſe of a *Mohabât* ſale tranſacted by a dying bankrupt.

He may engage in a *Sillim* contract,

It is lawful for a licenced ſlave to engage in a *Sillim* contract, and to give his aſſent thereto, as this is a commercial tranſaction.—It is alſo lawful for him to conſtitute an agent for purchaſe or ſale, as he has ſometimes occaſion for ſuch.

or give and accept pledges,

or hire land, &c.

or purchaſe grain for cultivation,

or engage in a commercial partnerſhip, or a contract of *Mozâribat*,

or let himſelf to hire.

It is lawful for a licenced ſlave to give and to accept pledges, as this is a dependant concern of traffic, being a mode of paying and exacting payment.—It is moreover lawful for him to hire land, houſes, or ſervants, all theſe being tranſactions of traffic. He may likewiſe take land from a perſon under a *Mozâreeat*, or compact of cultivation, as this is attended with advantage;—and he may alſo purchaſe grain, and ſow it in his own grounds, as by this means it yields a profit. A licenced ſlave is alſo at liberty to enter into a *Shirkat Ainân*, or partnerſhip in traffic, with any perſon, or to entruſt his property to any one in the manner of *Mozâribat*, or to take charge of another's property with a view to manage it by *Mozâribat*,—all ſuch acts being cuſtomary amongſt merchants.—It is alſo lawful for him to let himſelf to hire, according to our doctors. *Ziffer* and *Shafeï* diſſent from this opinion; for they argue that as he cannot ſell *himſelf*, ſo neither can he ſell his *ſervices*, ſervice being a dependant of the perſon; and where he lets himſelf to hire, it is a ſale of his ſervices. The argument of our doctors is, that as the perſon of the ſlave in queſtion conſtitutes his capital, he is therefore empowered to act with it, unleſs his ſo doing ſhould involve a deſtruction of his licence,—as where, for inſtance, he ſells his perſon, or delivers it up in pledge;—for if he were to ſell himſelf, and the ſale be valid, he thereupon becomes the property of the purchaſer, and the licence granted him by his former maſter becomes null, and he remains inhibited until he receive a new licence from his ſecond maſter, the purchaſer; and in the ſame manner, if he were to pawn himſelf, he would be prevented from acting in conſequence of being detained in the pawnee's hands, whence the advantage propoſed by the maſter in granting him a licence would be defeated. By *hiring* himſelf, on the contrary, he does not ſubject himſelf to inhibition, and the end propoſed by the maſter (namely, advantage) is alſo obtained:—whence he is empowered ſo to do.

If his licence expreſs only one mode of trade, he is licenced with reſpect to every deſcription of it.

If a perſon licence his ſlave with reſpect only to *one* mode of traffic, (ſuch as *clothiery*, for inſtance,) the ſlave becomes licenced with reſpect to all ſorts of trade. *Ziffer* and *Shafeï* maintain that he is licenced only with reſpect to that particular branch of trade:—and the ſame difference of opinion obtains, ſuppoſing the maſter expreſsly to inhibit his ſlave from exerciſing any other buſineſs. The argument of *Ziffer* and *Shafei* is, that the licence granted by the maſter is, in fact, a delegation and appointment of agency proceeding from him; becauſe a licenced or privileged ſlave derives his power of acting from his maſter, in whom alſo is eſtabliſhed the effect of his acts (namely, right of property,) and not in the ſlave, (whence it is that the maſter may lay him under inhibition at pleaſure;) and that therefore the licence of trading, granted to the ſlave, is reſtricted to the particular branch mentioned by the maſter; in the ſame manner as holds with reſpect to a *Mozárib*, or manager under a *Mozáribat* contract.—The argument of our doctors is, that a licence of trade, granted to a ſlave, is a remiſſion of his maſter's right, and a removal of inhibition from the ſlave, as has been already explained. The maſter, therefore, in the preſent inſtance, in granting the licence, removes all reſtraint from the ſlave; and as, on this happening, his natural power of action is rendered apparent, and he becomes entitled to act in virtue of his own inherent competency, it follows that his power of action is not reſtricted to any particular branch of trade.—It is otherwiſe with an agent; for as he acts with the property of another, his power of acting is conſequently eſtabliſhed on behalf of the owner of ſuch property.—The effect, moreover, of the ſlave's tranſactions (namely, right of property) is eſtabliſhed in the ſlave; whence it is that he is entitled to expend what he acquires in the diſcharge of his debts, and in maintenance, the exceſs going to his maſter, who becomes proprietor thereof by ſucceſſion.

Authority to perform any particular matter is not a general licence.

If a perſon authorize his ſlave with reſpect to any particular matter, ſuch as to purchaſe cloth for apparel, or victuals for his family, the ſlave does not hereby become licenced, ſince a licence of this nature is merely an *employment*.—The ground of this is that if the ſlave, by being ſo authorized, were to become licenced, it would preclude the maſter from employing him.—It is otherwiſe where a perſon ſays to his ſlave, "pay me ſo much *per* month out of your acquiſitions," (or "pay me one thouſand *dirms*,")—"and you are free;"—for in this caſe the ſlave becomes licenced, as the maſter here requires property from him, which he cannot procure but by engaging in trade. It is alſo otherwiſe where a maſter directs his ſlave to exerciſe any particular art, ſuch as *dying* or *fulling*; for here likewiſe the ſlave becomes licenced; becauſe the maſter's direction, in this inſtance, is a licence to him to purchaſe the materials requiſite for dying or fulling cloth; and as this is *a licence to purchaſe*, he accordingly becomes licenced with reſpect to every branch and deſcription thereof.

A licenced ſlave's acknowledgement of debt, uſurpation, or truſt, is valid;

A LICENCED ſlave's acknowledgment of debt or uſurpation is valid, and ſo likewiſe his acknowledgment of a truſt; becauſe acknowledgment is incidental to traffic; and hence if his acknowledgement were not valid, people would always decline dealing with him, and would avoid purchaſing from or ſelling to him.—This rule obtains whether the ſlave be involved in debt or otherwiſe.—In ſhort, his acknowledgment

Digitized by Google

knowledgment is valid in either caſe, provided it be made during health: but when it is made during ſickneſs, his debts contracted during health muſt be diſcharged prior to thoſe acknowledged during ſickneſs, in the ſame manner as obtains concerning a freed-man.—It is otherwiſe, however, with reſpect to his acknowledgment of a matter not rendered obligatory upon him in courſe of trade; for ſuch acknowledgment is invalid, ſince in regard to it he is inhibited*.

but not of a matter which has not occurred in courſe of *trade*.

He cannot marry; nor contract his ſlave in marriage;

It is unlawful for a licenced ſlave to marry †, this not being a commercial tranſaction: neither is he at liberty to contract his male or female ſlave in marriage.—*Aboo Yooſaf* maintains that he is at liberty to contract his *female* ſlave in marriage; for as he thereby obtains property, namely, her dower, his ſo contracting her conſequently reſembles his letting her out to hire.—The argument of *Haneefa* and *Mohammed* is that licence comprehends merely *commercial* tranſactions; and the contracting of a female ſlave in marriage is not a matter of commerce; whence it is that a licenced ſlave is not empowered to contract his male ſlave in marriage.—The ſame difference of opinion obtains concerning a licenced infant, a *Mozâribat* manager, a partner in *Shirkat Ainân*, and a father or executor;—that is to ſay, theſe are not at liberty to contract a *male* ſlave in marriage, according to all our doctors; but concerning their right to contract a *female* ſlave in marriage there is a difference of opinion between *Aboo Yooſaf* and the other two.

nor render him a *Mokâtib*;

A licenced ſlave is not at liberty to conſtitute his ſlave a *Mokâtib*, becauſe this is not a commercial tranſaction; for commerce conſiſts in an exchange of property for property; and this characteriſtic does not exiſt in a contract of *Kitàbat*, as the conſideration of *Kitàbat* (that is,

---

[*] Arab. *Mahjoor*. This word muſt here be taken as a ſubſtantive technical term, meaning *an inhibited ſlave*.

[†] Without the conſent of his maſter or owner.

the ranſom) is oppoſed to the removal of reſtraint, which is not property.—A licenced ſlave, therefore, conſtituting his ſlave a *Mokâtib*, does an act which is unlawful;—unleſs, however, his maſter aſſent, and he himſelf be not involved in debt,—in which caſe the contract of *Kitàbat* is lawful and valid, as the maſter has become proprietor of ſuch *Mokâtib* ſlave, the licenced ſlave being merely his ſubſtitute in conſtituting that ſlave *Mokâtib*: and in this caſe the rights of the contract revert to the maſter, as an agent or ſubſtitute, in executing a contract of *Kitàbat*, is merely a negotiator, in the manner of a meſſenger.

nor emancipate him for a compenſation;

A LICENCED ſlave is not at the liberty to emancipate his ſlave for a conſideration; for as he is not empowered with reſpect to a contract of *Kitàbat*, it follows, *a fortiori*, that he is not empowered with reſpect to manumiſſion in return for a compenſation.

nor *lend* or *beſtow* any thing; nor give alms.

A LICENCED ſlave is not at liberty to *lend* to any perſon; neither is he at all at liberty to make a gift, whether on condition of receiving a return or otherwiſe; and in the ſame manner, alſo, he is not competent to beſtowing alms;—for as all theſe are gratuitous acts, (gift on condition of a return being alſo gratuitous in the beginning,) they are not included in a licence to trade.—It is, however, lawful for him to beſtow a ſmall quantity of food upon a perſon, or to give an entertainment to a perſon who entertains him in return, ſince in the courſe of trade this is neceſſary to conciliate the minds of merchants.—It is otherwiſe with an unlicenced ſlave; for ſuch an one is not at liberty to make the ſmalleſt preſent, or to give an entertainment, becauſe this is requiſite only in the courſe of trade, and he is not licenced to trade, ſo as to be under any neceſſity of ſo doing.—It is recorded, from *Aboo Yooſaf*, that where a maſter gives his inhibited ſlave proviſions for one day, he may without heſitation invite friends to partake of the ſame: but if he give him a month's proviſions at one time, it is not in ſuch caſe lawful for him to invite his friends to partake of the ſame, becauſe

He may give food, or an entertainment;

if thoſe friends were to conſume the meat before the end of the month, it would be injurious to the maſter.—(Lawyers here obſerve that if a wife beſtow in alms, from the houſe of her huſband, any trifling matter, ſuch as a ſingle loaf, it is immaterial, ſince inhibition does not commonly deſcend to ſo ſmall an article.)

It is lawful for a licenced ſlave to make an abatement in the price of merchandize, on account of a defect, to the ſame degree as is made by merchants; becauſe this is a branch and a contingent of traffic, cuſtomary among traders; and it is frequently more advantageous to make an abatement than it would be to take back the defective article. It is otherwiſe where an abatement is made without any defect in the article; for this is unlawful, as being a purely gratuitous act after the completion of the contract, and not a branch or contingent circumſtance of traffic.—*Mohabât* is not of this nature in the beginning; for that is ſometimes neceſſary, in order to conciliate the minds of purchaſers.

or make an abatement in the price of merchandize in conſideration of a defect;

It is lawful for a licenced ſlave to indulge his debtors with a delay; and alſo to fix a time for the payment of his own debts; this being cuſtomary amongſt merchants.

or grant a term of credit.

Debt owing by a licenced ſlave attaches to his perſon,—that is to ſay, he may be ſold for ſuch debt,—unleſs his maſter ſatisfy the creditor by diſcharging it.—*Ziffer* and *Shafeï* maintain that he cannot be ſold.—His *earnings*, however, may be attached according to all, for concerning this there is no difference of opinion.—The reaſon alleged by *Ziffer* and *Shafeï*, why the ſlave ſhould not be ſold, is that the end propoſed by the maſter in licencing his ſlave is the acquiſition of *new* property, not the deſtruction of the *old*, which end may be obtained where the debts contracted by the ſlave attach to his *acquiſitions*, but not where they attach to his *perſon*;—whence it is that if, after paying debts, any thing remain, ſuch reſidue goes to the maſter.—It is otherwiſe

He may be ſold for the payment of debts

wiſe with reſpect to debt incurred by the ſlave for a deſtruction of property; for that attaches to his perſon, and he may be ſold on account of it; as ſuch deſtruction is a ſpecies of offence; and the deſtruction of a ſlave's perſon, in conſequence of an offence, does not depend upon his maſter's licence [for the perpetration of the offence.]—The argument of our doctors, in ſupport of the contrary opinion, is that the obligation of a debt incurred by a licenced ſlave evidently reſts upon his maſter alſo; for ſuch debt is contracted by the ſlave in conſequence of trade, and in that he has engaged with his maſter's concurrence.—The obligation of his debts, therefore, being evident in regard to the maſter, they conſequently attach to the ſlave's perſon, for the ſatisfaction of his [the ſlave's] creditors; in the ſame manner as a debt of reſponſibility for compenſation attaches to the perſon of a ſlave in caſe of his deſtroying the property of any one,—the reaſon of which is, that people may be protected from injury, and the ſame reaſon obtains in the caſe here conſidered.—Debt, therefore, contracted by the ſlave in queſtion, attaches to his perſon on this ground, that it is occaſioned by trade, and ſuch trade is engaged in and carried on with the maſter's concurrence.—Beſides, the circumſtance of the ſlave's perſon being liable for debts contracted by him in the courſe of trade is a motive to people to tranſact buſineſs with him; and for this reaſon it may be concluded that the maſter deſigned it [the ſlave's perſon] ſhould be ſo liable:—neither is this injurious to the maſter, as the injury to him is remedied or prevented by the article ſold being included in his right of property *.—As, moreover, the debt's attaching to the ſlave's *acquiſitions* is no ways repugnant to its attaching to his perſon, it therefore attaches to both;—the payment of them, however, being firſt made out of his acquiſitions, and if thoſe prove inſufficient,

---

* The expreſſion in this place is ſomewhat obſcure.—It moſt probably means that upon the ſlave being ſold for the diſcharge of his debts, as the ſale is executed oſtenſibly on behalf of the maſter, he is conſequently entitled to any exceſs which may remain from the price after the debts have been paid.

ſufficient, then by means of his perſon.—It is to be obſerved that the debts here treated of mean thoſe occaſioned by actual trade, ſuch as purchaſe and ſale, or by ſome tranſaction which is trade in effect, ſuch as hiring, or letting to hire, or reſponſibility, or a truſt or depoſit where they are denied by him,—or by a fine of treſpaſs incurred from his having copulated with a female ſlave whom he had purchaſed, but who afterwards proves to be the property of another; (for as the obligation of ſuch fine has been induced by the *purchaſe* of the female ſlave, it is conſequently referred thereto.)

contracted in the courſe of trade;

Upon a licenced ſlave being ſold for the diſcharge of his debts, his price is divided among the creditors in proportion to their reſpective claims; becauſe their right is connected with the ſlave's perſon; and the connexion of their right with his perſon is the ſame as with the eſtate of a defunct.—If, therefore, the price produced by the ſale prove inſufficient for the diſcharge of the debts, the reſidue is claimable from the ſlave upon his attaining freedom; becauſe the debts have been eſtabliſhed upon his credit, and his perſon has proved unequal to the payment of them:—but he cannot be ſold a ſecond time for the payment of the remaining debt; for if he were to be ſold again, after having been already purchaſed by ſome perſon, this perſon would ſuſtain an injury; and if, moreover, it were known that he is liable to be ſold a ſecond time, no perſon would bid for him, and conſequently the firſt ſale would be altogether prevented.—It is to be obſerved that the debts contracted by the ſlave in queſtion attach to all his gains and earnings, whether acquired *after* they were incurred or *before*; and alſo to any thing obtained by him in the manner of a gift; becauſe his maſter does not become proprietor of his acquiſitions until after they are free of all demands, which is not the caſe until his debts be paid.—They do not, however, attach to any thing which the maſter may have taken out of his hands before the debts were incurred, that being purely the property of the maſter, ſince the condition of its ſo being had exiſtence at the time of his taking it.—The maſter

and his price is divided among his creditors in proportion to their claims; he remaining reſponſible for the deficiency after he ſhall have become free.

is alſo entitled to take from the ſlave his proportionate produce*, which he has impoſed upon him monthly (for inſtance) *after* the debts were incurred, as well as *before*; for if he were prevented from ſo doing, he would lay an inhibition upon the ſlave, and conſequently no earnings could be acquired by him. But if he ſhould have taken from the ſlave, after the debts were incurred, any thing more than his *proportionate* produce, he muſt give the exceſs to the creditors, as their right has a preference: beſides, the maſter's right to take the *proportionate* degree of produce is becauſe of the neceſſity above ſtated, which does not exiſt with reſpect to any exceſs.

An inhibition laid upon him by his maſter does not operate until it be publicly known,

If a maſter impoſe inhibition upon his licenced ſlave, ſtill the ſlave does not become inhibited until the ſame be known to all merchants and *Bazàr* dealers; for if he were to become inhibited before, *Bazàr* dealers might ſuſtain an injury; becauſe they might ſell articles to an inhibited ſlave, under a ſuppoſition of his being licenced; and as their right could not attach to the ſlave's perſon, from the circumſtance of his being inhibited, the enforcement of it muſt conſequently be delayed until he obtain his freedom.—It is to be obſerved that it is requiſite that a *majority* of the merchants and dealers in the *Bazàrs* be apprized of the inhibition.—If, therefore, a maſter impoſe inhibition upon his licenced ſlave in the *Bazàr*, at a time when there are only one or two perſons preſent in that place, the ſlave does not become inhibited; whence if he [the ſlave] afterwards ſell to or purchaſe of the *Bazàr* dealers, it is valid, although ſuch purchaſe or ſale be tranſacted with perſons aware of the inhibition.—If, on the other hand, the maſter impoſe the inhibition in his own houſe, in preſence of a principal number of the *Bazàr* dealers, the ſlave is inhibited accordingly.—In

ſhort,

---

* *Ghàllá Miſslá*, meaning (in this place) the common produce from a ſlave's labour, in proportion to ſex, age, &c. for which (whatever deſcription the ſlave be under) the maſter has a claim, excluſive of any other advantage, daily, weekly, monthly, or annually, as he may have appointed.

Digitized by Google

ſhort, regard is paid to the notoriety and publicity of the inhibition, ſuch publicity ſtanding as the ſubſtitute of an appearance to all, in the ſame manner as the publicity of the miſſion of the prophets amounts to the actual appearance of the ſame to all mankind.

and he himſelf be made acquainted with it.

If a maſter impoſe inhibition upon his licenced ſlave; ſtill the ſlave continues licenced until ſuch time as he be informed of the inhibition, he in this particular reſembling an agent, who, if diſmiſſed by his conſtituent, does not ſtand as diſmiſſed until he be made acquainted with that circumſtance.—The ground of this is that if a licenced ſlave were liable to become inhibited without his knowledge, he would ſuſtain an injury, in this way, that any debts contracted by him after the inhibition, would fall upon his own property in the event of his becoming free.—With reſpect to the neceſſity of the inhibition being public and notorious, it obtains only where the licence has alſo been of a public nature;—for where the licence has not been public, none being acquainted with it but the ſlave himſelf, and his maſter afterwards impoſing inhibition upon him, he in this caſe becomes inhibited provided he be apprized, this not being injurious to any.

He becomes virtually inhibited on the death, apoſtacy, or inſanity of his maſter;

If the maſter of a licenced ſlave die, or become inſane, or apoſtatize from the faith and be united to a hoſtile country, ſuch licenced ſlave thereupon becomes inhibited; becauſe granting a licence to a ſlave is not an abſolute or binding act; (whence it is that a maſter may at any time revoke a licence granted by him:) and as it is a rule that the *continuance* or *duration* of any act not of a binding nature is ſubject to the ſame law with its *commencement*, it is therefore indiſpenſably requiſite that the maſter poſſeſs competency to grant a licence during the *continuance* in the ſame manner as at the *commencement* of ſuch licence:—but this competency is terminated by death or madneſs; and ſo likewiſe by expatriation, as that is death in effect,—whence it is that the property of an expatriated apoſtate is divided among his heirs.

or on himſelf abſconding.

If a licenced ſlave abſcond, he becomes inhibited.—*Shafeï* maintains that he ſtill continues licenced; for as his abſconding would not be repugnant to his receiving the licence in the beginning, ſo likewiſe it is not repugnant to it in its continuance;—in the ſame manner as in uſurpation; that is to ſay, if a perſon uſurp the licenced ſlave of another, the licence ſtill continues in force with reſpect to ſuch ſlave; and ſo alſo in the preſent inſtance.—The argument of our doctors is that the abſconding of a licenced ſlave operates as an inhibition upon him by inference; becauſe his maſter aſſented to the licence only under the idea of being able to pay ſuch debts as the ſlave might incur by means of his earnings; but upon his abſconding this ability no longer remains.—It is otherwiſe in a caſe of uſurpation; for the maſter's licence in regard to the ſlave ſtill continues after his being uſurped, ſince the maſter may eaſily recover him out of the hands of the uſurper, by an appeal to the magiſtrate.

A licenced female ſlave becomes inhibited by bearing a child to her maſter.

If a licenced female ſlave bear a child to her maſter, this circumſtance operates as an inhibition with reſpect to her.—*Ziffer* is of a different opinion; for he conceives an analogy between the *continuance* of licence and its *commencement*,—in other words, if a maſter grant his *Am-Walid* a licence to trade, it is lawful from the firſt, and ſo in the ſame manner the licence granted to a female ſlave continues in force after her bearing a child.—Our doctors, on the other hand, argue that it is moſt probable that, after her bearing a child to him, the maſter may be unwilling that his ſlave ſhould mix with other people for the purpoſe of carrying on commercial tranſactions, and will not permit her to go forth from his houſe, whence an inhibition may be inferred with reſpect to her by cuſtom.—It is to be obſerved that in caſe of a licenced female ſlave bearing a child to her maſter, he becomes reſponſible to her creditors for her value, as having (with reſpect to them) deſtroyed the ſubject with which their right was connected, ſince in conſequence of his creating her an *Am-Walid* ſhe

becomes

Digitized by Google

becomes incapable of being ſold, whereas otherwiſe ſhe might be ſold for the diſcharge of their demands.

If indebted, ſtill ſhe is not inhibited by being made a *Modâbbirá*.

If a licenced female ſlave be involved in debt to an amount beyond her real value, and her maſter afterwards create her a *Modâbbirá*, ſhe ſtill continues licenced as before, becauſe here is nothing which would argue her becoming inhibited, ſince it is not cuſtomary for a man to prevent his *Modàbbirá* from mixing with others for the purpoſe of tranſacting purchaſe and ſale:—neither is there any contradiction between the effect of licence and *Tadbeer*, ſince each induces a ſpecies of freedom, as in conſequence of licence a ſlave becomes empowered to act, and in conſequence of *Tadbeer* he acquires an ultimate claim to freedom, and between thoſe there is nothing irreconcileable. It is to be obſerved, however, that in conſequence of conſtituting his licenced ſlave a *Modàbbirá*, the maſter becomes reſponſible to her creditors for her value, for the reaſon already aſſigned in treating of an *Am-Walid*.

The acknowledgments of a licenced ſlave, laid under inhibition, are valid to the amount of the property in his hands.

Where a maſter impoſes inhibition upon his licenced ſlave, the ſlave's acknowledgments are valid to the amount of the property in his hands,—in other words, if he were to acknowledge that all the property in his hands is a *depoſit* belonging to a particular perſon, or that he has *uſurped* it from a certain perſon, or that he is *indebted* to that amount, ſatisfaction muſt be made from that property. This is according to *Haneefa*. The two diſciples maintain that his acknowledgments made after inhibition are invalid; for if his acknowledgment be rendered valid by a licence, that has been revoked by the ſubſequent inhibition, or if it be rendered valid by his *poſſeſſion*. of the property, that alſo has become null in conſequence of the inhibition, no regard being paid to the ſeizin of an *inhibited* perſon.—Hence the caſe is the ſame as if the maſter were to take the ſlave's acquiſitions out of his hands before he makes any acknowledgment, or, as if the inhibition were occaſioned by the maſter ſelling him to ſome other perſon,—whence it is that an acknowledgment made by him, with reſpect to his perſon, after inhibition, is not valid.—The argument of *Haneefa* is that the acknowledgment of the ſlave with reſpect to the property is rendered valid by his *poſſeſſion* of it, not by his *licence*, (whence the invalidity of his acknowledgment with reſpect to what his maſter has taken out of his hands.)—Now in the caſe in queſtion the ſlave ſtill continues *actually* poſſeſſed of the property;—and ſo likewiſe *virtually*; becauſe, in order to his poſſeſſion being annulled by inhibition, it is requiſite that the property be free of all wants or neceſſities on the part of the ſlave; but from his acknowledgment a continuance of his neceſſity may be inferred with regard to it.—It is otherwiſe with reſpect to any thing which the maſter may have taken out of his hands before acknowledgment; for as the maſter's poſſeſſion is eſtabliſhed with regard to that both *actually* and *virtually*, ſuch poſſeſſion cannot be annulled by the ſlave's acknowledgment; and in the ſame manner his perſon being the maſter's actual property, his [the maſter's] right therein cannot be annulled by the ſlave's acknowledgment without his concurrence. In ſhort, in the example here conſidered the ſlave's poſſeſſion of the property is fully eſtabliſhed; and hence his acknowledgments affecting it are valid. It would be otherwiſe if a maſter ſhould *ſell* his licenced ſlave; for there the purchaſer becomes his proprietor, whence the property in him undergoes a change; and as a change in the right of property occaſions a change in the property itſelf*, (as has been explained in its proper place,) the licence of the former maſter with reſpect to the ſlave therefore terminates; conſequently he becomes inhibited, and his acknowledgment with reſpect to the property in his hands is invalid;—whence it is that a ſlave ſo circumſtanced cannot appear as a litigant concerning a contract to which he had been a party before he was ſold.

If his perſon and property be involved

If a licenced ſlave be indebted to a degree which involves both his property and his perſon, in this caſe his maſter is not proprietor of any thing in his hands; inſomuch that if he were to pronounce a manumiſſion upon a ſlave, being part of the licenced ſlave's acquiſitions, yet the ſlave is not free, according to *Haneefa*. The two diſciples maintain that the maſter is proprietor of what is in the hands of the licenced ſlave; and that the ſlave who is part of the licenced ſlave's acquiſitions is therefore free; becauſe the occaſion of the maſter's right over the acquiſitions of his licenced ſlave (namely, his right of property with reſpect to ſuch ſlave's perſon) ſtill exiſts, ſince he is ſtill proprietor of his perſon;—whence it is that a maſter is empowered to emancipate his licenced ſlave, or to have carnal connexion with his licenced *female* ſlave; from the legality of which acts it may be inferred that a maſter's right in his licenced ſlave is complete and perfect.

---

* Namely the ſlave:—the phraze is here rather ambiguous, as the term *Mamlook* (which the tranſlator has rendered, in its literal ſenſe, *property*) is frequently uſed to ſignify a *ſlave*.

in debt, his maſter has no power over the property.

Objection.—From what is here advanced it would appear that the heir of a perſon deceaſed becomes proprietor of his eſtate, although it be involved in debt, ſince the occaſion of his right of property (namely, relationſhip) is fully eſtabliſhed;—whereas, in point of fact, the heir does not become proprietor of the eſtate in ſuch a caſe.

Reply.—The heir becoming proprietor of the eſtate of a perſon deceaſed is intended for the advantage of the latter, in order that his effects may not be diſſipated in the world, but go to his kindred.—Where, on the other hand, his eſtate is involved in debt, it is for his advantage that his heirs ſhould *not* become proprietors of it, in order that he may be freed from debt, and his future ſtate be well; for if he remain ſubject to debt, it might be injurious to him in his future ſtate.

—With reſpect, on the contrary, to the maſter's right in any thing which may be in his ſlave's poſſeſſion, it is not eſtabliſhed with a view to the advantage of the ſlave, but on account of the right of his maſter. The argument of *Haneefa* is that the maſter's right of property with reſpect to what may be in his licenced ſlave's hands is eſtabliſhed merely by ſucceſſion from the ſlave, and provided it be free from all incumbrance or neceſſity on his part,—in the ſame manner that an heir's right of property is eſtabliſhed in the eſtate of his anceſtor, as was before explained: but where the effects in the ſlave's hands are involved in debt, they are not free from incumbrance on his part, and hence the maſter is not proprietor thereof by ſucceſſion.—Now having thus explained the nature of the eſtabliſhment or *non*-eſtabliſhment of the maſter's right of property with reſpect to the effects in queſtion, the emancipation or *non*-emancipation of the ſlave, in conſequence of the maſter's manumiſſion, follows as a branch:—that is to ſay, with thoſe who hold that the maſter's right of property therein is not eſtabliſhed, the ſlave does not ſtand emancipated in conſequence of the maſter's manumiſſion;—and, on the contrary, with thoſe who conceive it to be eſtabliſhed, the ſlave is free in conſequence of ſuch manumiſſion.—It is to be obſerved that as, according to the two diſciples, the ſlave is rendered free by the maſter's manumiſſion, it follows (agreeably to this principle) that the maſter is reſponſible to the creditors of the licenced ſlave for the value of ſuch manumitted ſlave, their right having been connected with that ſlave's perſon.

If his property be not entirely involved, his maſter may emancipate a ſlave of his acquiſition.

If the property of the licenced ſlave above mentioned be not *entirely* involved in debt, and the maſter pronounce a manumiſſion upon the ſlave of ſuch licenced ſlave, it is valid and effectual, according to all our doctors. Its validity according to the two diſciples is evident; and ſo likewiſe according to *Haneefa*; for as the property of a licenced ſlave can never be *completely* free from debt, if a ſmall debt, from its prohibiting the eſtabliſhment of the maſter's right of property, were to prevent the validity of a manumiſſion pronounced by him, the maſter would always be precluded from any uſe of his licenced ſlave's property, and conſequently the end propoſed by him in granting the licence would be defeated;—whence it is that the circumſtance of a ſmall debt attaching to the eſtate of a deceaſed perſon does not prevent his heirs from inheriting, whereas if the eſtate were completely involved in debt they would be prevented.

Further rules with reſpect to a licenced ſlave involved in debt.

If the licenced ſlave here treated of ſell any thing to his maſter for an adequate price, it is lawful; becauſe, where a licenced ſlave is involved in debt, his maſter is, with reſpect to his acquiſitions, in the ſame predicament as any other perſon. If, on the contrary, he ſell any thing to his maſter at a price ſhort of the value, it is unlawful, as he is in ſuch caſe liable to ſuſpicion with regard to his maſter. It is otherwiſe where he ſells any thing at an under value to a ſtranger; for (according to *Haneefa*) this is lawful, as he is not liable to ſuſpicion with regard to a ſtranger. It is alſo otherwiſe where a dying perſon ſells any thing to one of his heirs for an adequate price; becauſe this (according to *Haneefa*) is unlawful, as the right of the other heirs is connected with the *ſubſtance* of that thing, (whence any one of the heirs is at liberty to redeem it by paying the value,)—whereas the right of the creditors of a licenced ſlave is connected with the *property* of the ſlave's effects, not with the *ſubſtance* of them, (whence it is that the ſlave's maſter is at liberty to redeem the effects, by diſcharging the creditors' demands out of his own ſubſtance.)—Beſides, by the ſlave ſelling the article for an adequate price, the right of the creditors, which is connected merely with the *property* of it, is not annulled; and conſequently the ſale is valid;—whence there is an evident difference between the caſe of the dying perſon and that of the licenced ſlave. The two diſciples allege that if the licenced ſlave in queſtion ſell any thing to his maſter for a price even *ſhort* of the value, the ſale is lawful,—but in this way, that the maſter has it at his option either to pay the difference of value, or to break off the contract. It is to be obſerved that, according to the tenets of both parties, (that is, of *Haneefa* and the two diſciples,) a ſale at an under value is in this inſtance the ſame, whether the loſs upon it be great or ſmall. The reaſon, alſo, of the ſale being rendered lawful in the way above deſcribed, is that it is prohibited merely for the ſake of avoiding any injury to the creditors; but where it is made lawful in the manner there ſuggeſted, they ſuſtain no injury, and it is conſequently lawful for the reaſon aſſigned. It is otherwiſe where the licenced ſlave in queſtion ſells any thing at a ſmall under value to a ſtranger; for ſuch ſale is lawful, without the ſtranger paying the difference of price;—but the maſter is directed to pay the difference;—becauſe the degree or proportion in which the article has been undervalued admits of two conſtructions; for firſt, it may be conſidered purely as a *gift*, no part of the price being oppoſed to it; and, ſecondly, it may be conſidered purely as a *ſale*, as ſome appraiſers will value the whole article according to the price for which it was ſold:—hence it is conſidered as a gift, in caſe of the maſter being the purchaſer, ſince in that caſe the ſlave is liable to ſuſpicion; and, on the other hand, it is not conſidered as a gift in caſe of a ſtranger being the purchaſer, ſince in ſuch a caſe no ſuſpicion can be entertained. It is alſo otherwiſe where the licenced ſlave in queſtion ſells any thing to a ſtranger at a *great* undervalue; for in this caſe the ſale is unlawful, according to the two diſciples;—whereas, if made to the maſter, it would be lawful, and he would be deſired to make up the difference by paying the whole value; for (according to the two diſciples) it is not lawful for a licenced ſlave to ſell any thing at an undervalue without his maſter's concurrence; and where he thus ſells a thing to a ſtranger, this concurrence does not exiſt; but it exiſts, by inference, where he thus ſells a thing to his maſter, whence the ſale is lawful in this inſtance;—the maſter, however, muſt be deſired to make up the difference by paying the whole value of the article, becauſe of the right of the creditors. The diſtinctions here explained are agreeably to the tenets of the two diſciples.

If the maſter ſell any thing to his licenced ſlave for an adequate price, or for leſs than the value, it is lawful, becauſe the maſter is as a ſtranger with reſpect to the acquiſitions of his licenced ſlave when involved in debt, for the reaſon before aſſigned; (nor is there any room for ſuſpicion in this inſtance;)—and alſo, becauſe the ſale in queſtion is attended with two advantages,—one, that an advantage is derived to the ſlave's acquiſitions, in the article purchaſed from his maſter,

maſter;—and another, that the maſter is enabled to take the price out of the ſlave's acquiſitions after having been diſabled to take any thing from them;—and the ſale, as being thus attended with a twofold advantage, is accordingly valid, ſince the validity of a ſale is a conſequence of its being advantageous.—If, therefore, the maſter deliver the article ſold before he has received the price of it, his right to take the price ceaſes; for he only had a right to detain the article ſold in order to ſecure the price; and, upon his delivering the article, that right ceaſes; and if, afterwards, the price ſtill remain unpaid, it follows that ſuch price is a debt upon the ſlave's perſon; but a maſter has no claim to a debt due from his ſlave. It is otherwiſe, however, where the price conſiſts of ſubſtance, that is, of particular goods or effects, for in that caſe the price is not annulled or remitted upon the delivery of the article ſold, ſince ſuch goods or effects are ſpecific, and the maſter's right, connected with them, may lawfully continue in force. If, alſo, the maſter detain the article ſold, and refuſe to deliver it until he receive the price, it is lawful; becauſe a ſeller has a right to detain the article ſold;—whence it is that the right of a ſeller has a preference over that of any other creditors. A maſter, moreover, has a legal claim to a debt due from his ſlave, where it relates to ſubſtance;—whence it is that a maſter has a claim upon his *Mokâtib* for his ranſom, which is a debt, becauſe it is a debt relating to his perſon. What is ſaid above, that "if the maſter deliver the article "ſold before he has received the price of it, his right to take the price "ceaſes," is according to the *Zâhir Rawâyet*. *Aboo Yooſaf* alleges that this is where the article ſold is not extant in the ſlave's poſſeſſion; for if it be extant in his hands, the maſter is entitled to take it back and detain it until he receive the price.

If a maſter ſell any thing to his indebted licenced ſlave at an overvalue, in this caſe he muſt be directed either to return what he may have received over and above the real value of the article, or to undo the ſale,—in the ſame manner as before explained in the caſe of the licenced ſlave being the ſeller, and his maſter the purchaſer; becauſe the right of the creditors is connected with ſuch exceſs.

His maſter may emancipate him, remaining reſponſible to the creditors for his value:

If a maſter emancipate his licenced ſlave, he [the ſlave] being involved in debt, ſuch manumiſſion is valid; becauſe the maſter is proprietor of the ſlave, and his right of property in him ſtill continues after licence. The maſter, however, is reſponſible to the creditors for the value of the ſlave, as having deſtroyed their right, which was connected with the ſlave in this manner, that they might have ſold him, and paid themſelves out of his price. The creditors alſo have a claim upon the ſlave, after he becomes free, for the proportion in which his value falls ſhort of his debts; becauſe the debts reſt upon the faith of his perſon, and the maſter is not liable to more than a compenſation for what he has deſtroyed. If, however, the ſlave's debts be ſhort of his value, in this caſe the maſter, in conſequence of emancipating him, is reſponſible to the creditors only for the amount of the debts, that alone being their right. It is otherwiſe where a maſter emancipates his *Modabbir* or *Am-Walid*, being licenced and indebted, for in this caſe he does not owe any thing whatever to the creditors, ſince their right does not attach to the *perſon* of the *Modabbir* or *Am-Walid* ſo far as that they might ſell them to obtain payment of their demands, and hence the maſter has not, by emancipating thoſe ſlaves, injured the right of their creditors.

and he may alſo ſell him; but the creditors are entitled to the price, or may demand a compenſation either from the *ſeller* or the *purchaſer*.

If a maſter ſell his licenced ſlave, who is indebted to a degree that involves his perſon, and the purchaſer take poſſeſſion of the ſlave, and ſend him away or hide him, in this caſe the creditors have it in their option to take a compenſation either from the maſter who ſold the ſlave, or from the purchaſer;—becauſe their right is connected with the ſlave's perſon; (whence their title to ſell him unleſs the maſter pay their demands;) but the maſter, in ſelling the ſlave, and delivering him to the purchaſer, effectually deſtroys their right, as attached to his perſon; and, on the other hand, the purchaſer alſo deſtroys their

Digitized by Google

their right by ſending the ſlave away or concealing him. Hence they are entitled to take the compenſation from either party. They may alſo lawfully accede to the ſale, and take the price, as that is their right, and this ultimate permiſſion ſtands in the place of a prior permiſſion;—in the ſame manner as where a pawner ſells the article pledged, and the pawn-holder then accedes to the ſale; in which caſe this ultimate conſent ſtands in the place of a prior conſent. It is to be obſerved that if, in the caſe here conſidered, the creditors take the value from the maſter who ſold the ſlave, and the purchaſer afterwards return him upon a diſcovery of defect, the right of the creditors then attaches to the ſlave's perſon, and the maſter is entitled to recover from them the value of the ſlave, which he had paid to them in compenſation; becauſe the ſole reaſon for his being ſubject to compenſation was his ſelling the ſlave and delivering him to the purchaſer, and this reaſon is removed by the purchaſer returning him.—The maſter may therefore take from the creditors whatever he had paid to them in compenſation;—in the ſame manner as where an uſurper ſells and delivers to the purchaſer the article uſurped, and pays a compenſation for the value to the owner, and the purchaſer afterwards returns the article upon a diſcovery of defect,—in which caſe the uſurper is entitled to give the uſurped article to the owner, and to recover from him the value which he had paid in compenſation.

If the maſter ſell him, at the ſame time explaining his ſituation as being involved in debt, the creditors may annul the ſale.

If a maſter ſell his licenced ſlave, being a debtor, giving notice at the ſame time to the purchaſer that the ſlave is involved in debt, in order that he may have no option of rejection from the ſlave's defectiveneſs in being indebted, in this caſe the creditors are entitled to annul the ſale, on account of their right attaching to the ſlave. Beſides, they have a right either to require ſervice of the ſlave to ſuch a degree as may ſuffice for the diſcharge of their demands, or to ſell him, and thus pay themſelves, either of theſe modes being attended with a different advantage; for in the former inſtance the advantage is complete, the payment of the whole debt being thereby obtained, but by degrees, and with delay; and in the latter inſtance it is incomplete, nothing more being procured there than the price for which the ſlave is ſold,—but which is obtained upon the inſtant.—Hence they have the option either of requiring the ſlave's ſervice, or of ſelling him:—but their option is deſtroyed if the ſale in queſtion be valid ſo as to put it out of their power to diſſolve it:—they are therefore entitled to diſſolve it. The learned have ſaid that this rule holds only where the price obtained for the ſlave does not go to the creditors; for where they receive the price, and the ſale is not concluded at an under-value, they are not at liberty to diſſolve it, as in this caſe they receive their right. It is to be obſerved that, in the caſe here conſidered, if the maſter who ſold the ſlave diſappear, and the purchaſer deny the ſlave's debts, the creditors are not entitled to litigate the matter with him, according to *Haneefa* and *Mohammed.* *Aboo Yooſaf* is of opinion that the creditors are entitled to litigate the matter with the purchaſer, and that the *Kâzee* muſt decree them the debt and cauſe it to be paid to them.—(Analogous to this is the difference of opinion which obtains among our doctors concerning a houſe, which a perſon having purchaſed, makes a gift of, and delivers it to the donee, and then diſappears, and the *Shafee* (or perſon to whom the right of pre-emption appertains) appears and lays his claim to the houſe;—for according to *Haneefa* and *Mohammed,* he [the *Shafee*] is not at liberty to proſecute the donee,—whereas *Aboo Yooſaf* holds a contrary opinion.)—The argument of *Aboo Yooſaf* is that, in the caſe here conſidered, the purchaſer pleads his right of property, and is conſequently prepared to litigate with any perſon who may diſpute it with him.—The argument of *Haneefa* and *Mohammed* is that if the plea of the creditors be admitted to lie againſt the purchaſer, it occaſions the contract to be broken.—Now the contract has been concluded by both the ſeller and the purchaſer. If, therefore, a decree be paſſed in favour of the creditors, diſſolving the ſale, it is a decree operating, by effect, againſt an abſentee, (for the ſeller is abſent,) which is unlawful.

Caſe of a perſon appearing in the character of a licenced ſlave, and acting as ſuch.

If a perſon come to a city where he is unknown, and, declaring himſelf to be the ſlave of a particular perſon, make purchaſe and ſale, in this caſe any commercial tranſactions in which he may engage are binding upon him; becauſe he has declared himſelf a licenced ſlave; and ſuch declaration is in proof againſt him. If, alſo, he make *no* declaration, ſtill his acts are valid, ſince it is apparent that if he were inhibited he would not have attempted to tranſact purchaſe and ſale; and in the tranſactions of mankind appearances are made a ground of practice, in order that the buſineſs of life may not be confined within too narrow limits. It is to be obſerved, however, that the ſlave in queſtion cannot be ſold for the payment of his debts until ſuch time as his maſter appear; becauſe his declaration cannot be admitted as affecting his perſon, ſince he is purely and ſolely the right of his maſter.—(It is otherwiſe with reſpect to his earnings or acquiſitions, thoſe being his own right, for the reaſons already explained.)—But if the maſter appear, and acknowledge that "this perſon is his licenced "ſlave," he may then be ſold for the payment of his debts, as in this caſe they are rendered apparent in relation to his maſter. If, on the contrary, the maſter ſhould ſay that "this is not a *licenced* ſlave," his declaration muſt be credited, as inhibition is the original ſtate of ſlaves, and the maſter's aſſertion in this inſtance correſponds with what is original.

SECTION.

SECTION.

A guardian may grant a licence to his infant ward, either expreſsly,

Upon a guardian granting a licence of trade to his infant ward, ſuch infant becomes, with reſpect to purchaſe and ſale, the ſame as a licenced ſlave, provided he be acquainted with the nature of commerce, ſo far as to know that in conſequence of ſale the article ſold paſſes from the property of the ſeller to that of the purchaſer, and that a profit is derived from it:—his acts, therefore, paſs and are of force. *Shafeï* alleges that his acts do not paſs; for as the inhibition of an infant is becauſe of infancy, it neceſſarily continues during the continuance of infancy; and hence his dealings do not take effect, any more than divorce or manumiſſion pronounced by him. It is otherwiſe with regard to the *faſting* and *prayer* of an infant, as thoſe are valid;—and ſo likewiſe *bequeſt* by an infant, according to *Shafeï*'s tenets; for it is a rule with him that every act which may be performed on behalf of an infant by his guardian, ſuch as purchaſe and ſale, is invalid and of no effect upon proceeding from the infant,—whereas, on the other hand, every act which cannot be performed on his behalf by his guardian, ſuch as faſting and prayer, is valid, proceeding from the infant. The reaſon of this is, that the acts of an infant are valid only from neceſſity. Now neceſſity exiſts with regard to faſting and prayer, ſince it is impoſſible that the faſts or prayers of the infant ſhould be obſerved or performed by his guardian;—thoſe, therefore, from this neceſſity, are valid, proceeding from the infant. Purchaſe and ſale, on the contrary, may be tranſacted by a guardian on behalf of an infant; and hence concerning theſe this neceſſity does not exiſt.—The argument of our doctors is, that the acts of the infant are ſtrictly legal, as proceeding from a competent perſon, and operating upon a fit ſubject; for the infant in queſtion is competent to act, ſince he is capable of expreſſing himſelf with propriety, and of diſtinguiſhing between right and wrong, upon which circumſtances the competency to act depends.—The acts, therefore, of the infant in queſtion are valid and effectual; for infancy occaſions inhibition merely becauſe of the infant's being unſkilled in dealings, and not becauſe of infancy being in itſelf a reaſon for inhibition; and the ſkill of the infant, in the preſent inſtance, may be inferred from the licence granted him by his guardian, ſince if the infant were not ſkilled, the guardian would not have granted the licence.

Objection.—If the infant be poſſeſſed of ſkill, and empowered to act, it would follow that his guardian's authority over him terminates; and that the guardian, after having licenced him, has it not in his power to render him inhibited;—whereas it is otherwiſe.

Reply.—The continuance of the guardian's authority is for the infant's advantage, in order that benefit may be derived to him in two ways,—in one way, by the infant acting for himſelf,—and in another way, by the guardian acting on his behalf. The continuance, on the other hand, of the guardian's power to impoſe inhibition upon the infant, is becauſe of the poſſibility of a change in the infant's ſtate or condition; and he is accordingly entitled to inhibit the infant after having licenced him. It is otherwiſe with reſpect to divorce or manumiſſion pronounced by the infant, for thoſe are invalid, as being particularly prejudicial; and accordingly an infant is incapable of divorcing his wife, or manumitting his ſlave.—In ſhort, an infant is competent to any act purely of an advantageous nature, (ſuch as the acceptance of a gift, or alms,) previous to obtaining the licence of his guardian, whereas, in matters which may be either advantageous, or otherwiſe, (ſuch as purchaſe and ſale,) he is competent *after* having obtained his guardian's licence, not *before*.

before. If, however, he tranſact a purchaſe or ſale before having obtained his guardian's licence, the validity of it depend upon his [the guardian's] approbation, as ſuch purchaſe or ſale may poſſibly be attended with advantage. It is to be obſerved that the office and denomination of guardian * of an infant extends to his father or father's executor, and alſo to his grandfather, and to the *Kázee*, or other executive magiſtrate. It is otherwiſe with reſpect to thoſe whoſe ſituation is merely conditional, (namely, governors of cities or diſtricts, ſuch as the *Ameer* of *Bokhàrá*,) for as thoſe have not the power of appointing a *Kázee*, they cannot grant an infant a licence to trade. From what is mentioned above, that "a licenced "infant becomes the ſame as a licenced ſlave," it may be inferred that all the laws which apply to the latter apply to the former likewiſe; becauſe licence operates as a removal of inhibition, after which the licenced perſon acts in virtue of his own competency, whether he be a ſlave or an infant:—hence his acts or dealings are not reſtricted to any particular deſcription.

or virtually, by acquieſcence;

If the infant above mentioned tranſact purchaſe and ſale, and his guardian, perceiving this, remain ſilent, the infant becomes licenced, in the ſame manner as a ſlave.

and the infant's acknowledgements are then valid:

If a licenced infant make an acknowledgment in favour of any perſon, affecting the acquiſitions in his hands, ſuch acknowledgement is valid,—(and ſo likewiſe his acknowledgment affecting any thing which may have come to him by inheritance, according to the *Zâhir Rawâyet*,)—in the ſame manner as an acknowledgment made by a licenced ſlave.

---

* Arab. *Wallee.*—Some lexicons pronounce it (perhaps more accurately) *Willee.*

but he cannot contraſt his ſlaves in marriage. Caſe of a lunatic.

A LICENCED infant is not at liberty to contract in marriage his ſlave or his *Mokâtib*, any more than a licenced ſlave. It is alſo to be obſerved that an occaſional lunatic, acquainted with the nature of purchaſe and ſale, is the ſame as an infant, and becomes licenced by the authority of his father or grandfather, or of his father's executor, but not of any other, as was before explained; and he is alſo ſubject to the ſame laws with the infant.

HEDAYA.

BOOK XXXVII.

Of GHAZB, or USURPATION.

Definition of the term.

GHAZB, in its literal ſenſe, means the forcibly taking a thing from another. In the language of the LAW it ſignifies the taking of the property of another, which is valuable and ſacred, without the conſent of the proprietor, in ſuch a manner as to deſtroy the proprietor's poſſeſſion of it;—whence it is that uſurpation is eſtabliſhed by exacting ſervice from the ſlave of another, or by putting a burden upon the quadruped of another; but not by ſitting upon the carpet of another; becauſe by the uſe of the ſlave of another, and by loading the quadruped of another, the poſſeſſion of the proprietor is deſtroyed; whereas by ſitting upon the carpet of another the poſſeſſion of the proprietor

Acts by which uſurpation is eſtabliſhed.

prietor is not deſtroyed.—It is to be obſerved that if any perſon knowingly and wilfully uſurp the property of another, he is held in law to be an offender, and becomes reſponſible for a compenſation. If, on the contrary, he ſhould not have made the uſurpation knowingly and wilfully, (as where a perſon deſtroys property on the ſuppoſition of its belonging to himſelf, and it afterwards proves the right of another,) he is in that caſe alſo liable for a compenſation, becauſe a compenſation is the right of man; but he is not an *offender*, as his erroneous offence is cancelled.

A wilful uſurper is an offender.

The uſurper of an article of the claſs of ſimilars is reſponſible for a ſimilar, if it be deſtroyed in his poſſeſſion.

If a perſon uſurp any thing of the claſs of ſimilars, ſuch as articles eſtimable by weight, or by meaſurement of capacity, and of which the particulars are nearly equal, and it be afterwards deſtroyed in his poſſeſſion, he is in that caſe reſponſible to the proprietor for a ſimilar; becauſe God has ſo ordained in the Koran; and alſo, becauſe the giving of a ſimilar in return is the juſteſt method, ſince a regard is thereby ſhewn both to the *genus* and the *ſubſtance*, and conſequently the injury to the proprietor is thereby removed in the moſt eligible manner. If, however, the uſurper be not able to give a ſimilar, becauſe of no ſimilar being to be found, he in that caſe becomes reſponſible for the value which the article bears at the time of the ſuit or contention. This is according to *Haneefa*. *Aboo Yooſaf* maintains that he becomes reſponſible for the value the thing bore upon the day of uſurpation. *Mohammed*, on the other hand, has ſaid that he becomes reſponſible for the value it bore upon the day when the ſimilar was not to be found or procured. The reaſoning of *Aboo Yooſaf* is, that whenever a ſimilar became unattainable, the thing then became the ſame as if it was not of the claſs of ſimilars. Hence it is neceſſary to have regard to the value on the day of uſurpation; becauſe uſurpation being the cauſe which induces reſponſibility, it follows that the value on the day of the eſtabliſhment of the cauſe ought to be regarded. The reaſoning of *Mohammed* is, that the uſurper is reſponſible for a *ſimilar*; and that, as this reſponſibility is afterwards referred to the value, for no other reaſon than that a ſimilar is not to be found, it follows that regard is to be had to the value the article bore on that day *. The reaſoning of *Haneefa* is, that the reſponſibility is not referred to the value immediately upon the extinction of a ſimilar, ſince the proprietor may, if he pleaſe, delay until a ſimilar ſhall be found: but that the reſponſibility is referred to the value merely on account of the decree of the *Kâzee*; and that therefore the value on the day of contention (which is the day of the decree of the *Kâzee*) ought to be regarded. It is otherwiſe with reſpect to a thing which is not of the claſs of ſimilars; becauſe in ſuch caſe the value is demanded from the uſurper in virtue of the original cauſe, namely, the uſurpation; and therefore the value it bore *on the day of uſurpation* is to be regarded.

If the article be of the claſs of *non*-ſimilars, he is reſponſible for the *value*.

If a perſon uſurp any article of the claſs of *non*-ſimilars, (ſuch as where the particulars are different, like houſehold goods,) he is in that caſe reſponſible for the value the article bore on the day of uſurpation; for as it is here impoſſible to preſerve the right of the proprietor with reſpect to *quality*, it is therefore neceſſary to preſerve that right with reſpect to *ſubſtance* only, in order that the injury to him may be done away in the utmoſt poſſible degree. (It is to be obſerved, that if a perſon uſurp wheat in which there is a mixture of barley, he becomes then reſponſible for the value, as that is of the claſs of non-ſimilars.)

The actual article uſurped muſt be reſtored to the proprietor, if it be extant,

It is incumbent upon an uſurper to reſtore the identical article uſurped to the proprietor of it, provided it be extant in his poſſeſſion; becauſe the prophet has ſaid, "*It is incumbent upon a perſon who takes "a thing from another to reſtore it to him*;" and alſo, "*It is not lawful "for a perſon to take the goods of his brother in any manner*," (that is,

---

* Arab. *Yawm-al-Inkattà*.—Literally, the day of termination; meaning, the day on which the power of returning a compenſation by a ſimilar terminated.

neither

Digitized by Google

neither in a *familiar eaſy* way, nor by *violence* and *contention*;) " *and* " *therefore, if a perſon do take any thing, he muſt reſtore it to its* " *owner*;"—and alſo, becauſe the proprietor's ſeizin or poſſeſſion of his property being his own right, which the uſurper has deſtroyed, it is therefore incumbent on the uſurper to reſtore the right to its owner,—that is to ſay, to give back the actual thing taken. This, moreover, is what is originally incumbent, agreeable to the opinion of moſt of the learned; and the giving of the value to the proprietor is merely a cauſe of releaſe from ſtrife, inaſmuch as it is defective; whereas the perfection lies in the reſtoration of the actual thing. Some of the learned, however, have ſaid that the original obligation is that of giving the value; and that the reſtitution of the actual article is merely a *cauſe* of releaſe. A reſult of this diſagreement appears in the different deductions ariſing from it; as where, for inſtance, the proprietor exempts the uſurper from the value, at a time when the actual thing is extant in his poſſeſſion; in which caſe, according to the latter opinion, (above mentioned, of *ſome* of the learned,) the exemption is valid; whence if the article be deſtroyed in the poſſeſſion of the uſurper ſubſequent to the exemption, he does not (according to their tenets) become reſponſible for a compenſation; whereas, in the opinion of *moſt* of the learned, he becomes reſponſible. It is to be obſerved that, according to the opinion of *moſt* of the learned, it is incumbent upon the uſurper to reſtore the thing to the proprietor in the place where he had uſurped it, becauſe the value of things varies in different places.—If the uſurper plead that he has *loſt* the article, the magiſtrate muſt cauſe him to be impriſoned for a length of time ſufficient to aſcertain whether or not he has the thing in his poſſeſſion, and muſt then enjoin him to give the value of it. The reaſon of this is, becauſe the original obligation is the reſtoration of the actual thing, and the circumſtance of the *loſs* of it being merely an *accident*, is not credited, as it is contradicted by appearances; in the ſame manner as where a perſon who owes the price of goods pleads poverty, in which caſe he muſt be confined until the truth of his plea be aſcertained.—

in the place where it was uſurped;

and failing of this, the uſurper muſt be impriſoned until he make ſatisfaction.

Whenever, therefore, it becomes known that the article uſurped has really been loſt in the poſſeſſion of the uſurper, the obligation to reſtore the actual thing is annulled, and a compenſation (that is, the value of the thing) becomes obligatory. It is further to be obſerved, that uſurpation (ſo as to occaſion reſponſibility) takes place only with reſpect to moveables, ſuch as a garment, or the like; for the deſtruction of the proprietor's poſſeſſion cannot otherwiſe be effected than by *removal*. If, therefore, a perſon ſhould uſurp *land*, and the land be deſtroyed in his poſſeſſion, (that is, be rendered uſeleſs by an *inundation*, or the like,) the uſurper is not reſponſible for it. This is the opinion of *Haneefa* and *Aboo Yooſaf*. *Mohammed* alleges that the uſurper is reſponſible for the land; and this is the firſt opinion of *Aboo Yooſaf*, which has likewiſe been adopted by *Shafeï*. The arguments in favour of the latter opinion are, that the poſſeſſion of the uſurper is eſtabliſhed with reſpect to the land uſurped, which occaſions a deſtruction of the proprietor's poſſeſſion, ſince it is impoſſible that one thing can be in the poſſeſſion of two people at one and the ſame time.—*Uſurpation*, therefore, which means the annihilation of the *proprietor*'s poſſeſſion, and the eſtabliſhment of the *uſurper*'s, exiſts in the caſe of land: hence land is in this reſpect the ſame as moveable property, and therefore the uſurper of it is reſponſible for it; in the ſame manner as a denying truſtee; that is, if a perſon depoſit land in the hands of another, and that other afterwards deny the depoſit, in that caſe he becomes reſponſible for the land, and ſo alſo in the caſe in queſtion. The arguments of *Haneefa* and *Aboo Yooſaf* are, that uſurpation is the eſtabliſhment of the uſurper's poſſeſſion by a deſtruction of that of the proprietor, in ſuch a manner that the cauſe of the *eſtabliſhment* of the poſſeſſion, and of the *deſtruction* of it, is the action of the uſurper with reſpect to the thing uſurped, ſuch as the removal of it from one place to another. Now this is impracticable with reſpect to land or houſes, becauſe the proprietor's poſſeſſion of theſe cannot otherwiſe be deſtroyed than by driving him from them. But the driving away of the proprietor from his *houſe* (for inſtance) is not an action of the uſurper

Uſurpation (ſo as to occaſion reſponſibility) cannot take place but in moveable property.

Digitized by Google

uſurper with reſpect to the thing, but with reſpect to the perſon of the proprietor, and therefore amounts to the ſame as if he were to remove the proprietor from his cattle. In the uſurpation of *moveables*, on the contrary, the removal is the action of the uſurper operating with reſpect to the *article*; and this is uſurpation. With reſpect to the caſe of a truſtee who denies the depoſit, (adduced by *Mohammed* as being analogous to the caſe in queſtion,) it is not admitted to be ſuch; but allowing that it were, it is anſwered that the neceſſity for a compenſation in that inſtance ariſes from the want of care which is manifeſted by the denial of the truſtee.

The uſurper of a houſe is reſponſible for the furniture:

An uſurper is reſponſible, according to all our doctors, for whatever he breaks of a houſe, either by his reſidence in it, or by his pulling it down, becauſe that is a wilful deſtruction, and compenſation for fixed property is incurred by wilful deſtruction,—as where, for inſtance, a perſon removes the manure or water from land, that being an act with reſpect to the ſubſtance of the land.

but if he ſell the houſe, and the proprietor have no witneſſes, he is not reſponſible.

If a perſon uſurp a houſe, ſell it, and deliver it to the purchaſer, and afterwards acknowledge the uſurpation, and the purchaſer deny it; and there be no witneſſes on the part of the proprietor to prove it, in this caſe there is a diſagreement between *Haneefa* and *Aboo Yooſaf* on one ſide, and *Mohammed* on the other; for, according to the two diſciples, the ſeller of the houſe is not reſponſible on account of the ſale and delivery of it to the purchaſer; (contrary to the opinion of *Mohammed*;) becauſe ſale and delivery to the purchaſer is merely an *uſurpation* on the part of the ſeller; and uſurpation of moveable property (according to the two diſciples) does not induce compenſation.

A uſurper of land is reſponſible for

If uſurped land be damaged by the cultivation of it, the uſurper muſt compenſate for the damage, ſince he has deſtroyed part of the land.

any damage occaſioned by the cultivation of it.

land.—He muſt, moreover, deduct from the produce of the land the amount of his ſtock, that is to ſay, the quantity of the ſeed ſown, and alſo the amount he may have paid for the damage; and if any ſurplus ſhould then remain, he muſt beſtow it in charity.—The compiler of the *Hedàya* remarks that this is according to *Haneefa* and *Mohammed*; but that *Aboo Yooſaf* has ſaid that it is not neceſſary to beſtow the ſurplus in charity. Their arguments ſhall be recited at large hereafter.

The uſurper of a *moveable* is reſponſible for the value in caſe of its deſtruction.

When an article of uſurped *moveable* property is deſtroyed in the poſſeſſion of the uſurper, whether by his act, or by the act of another, in either caſe he is reſponſible for the value of it:—according to thoſe who hold that the giving of the value is originally incumbent, and the reſtitution of the actual thing a releaſe, becauſe the releaſement being here impracticable, the giving of the value which was originally due is therefore eſtabliſhed;—and alſo according to thoſe who hold that the reſtitution of the actual thing is originally due, and that the giving of the value is merely ſubordinate thereto; becauſe the fulfilment of what is originally due being impracticable, in conſequence of the deſtruction of the actual thing, the value of it is therefore due.

If he himſelf render it defective he is reſponſible for ſuch defect,

If an uſurper ſhould, with his own hands, render defective the thing he had uſurped, he is in that caſe reſponſible for ſuch deficiency; for as, in conſequence of the uſurpation, he is reſponſible for the thing uſurped, *in all its parts*, it follows that whenever the reſtitution of any part of it becomes impracticable, the *value* of that part is due from him. It is otherwiſe with reſpect to a diminution of the value by depreciation; ſince for that the uſurper is not reſponſible, provided he reſtore the thing in the place of uſurpation; becauſe a diminution of the price ariſes from the diminution of deſire on the part of the purchaſer, and not from the ruin or deſtruction of any of the parts of the thing.—It is alſo otherwiſe with reſpect to things ſold which become defective

but not for any depreciation it may have ſuſtained in his hands.

Digitized by Google

defective in the poſſeſſion of the ſeller prior to his delivery of them; for he is not in that caſe under a neceſſity of compenſation to the purchaſer; becauſe reſponſibility for the article of ſale is a reſponſibility involved in the contract; and the ſubject of the contract is the actual wares, and not the *qualities* of them. With reſpect to uſurpation, on the contrary, that is an *act*, and qualities are liable to be compenſated for by an act, but not by a contract, as has been already demonſtrated. The author of the *Hedâya* has ſaid that this caſe alludes to uſurped articles which are not of an increaſing nature; but that with reſpect to things of an increaſing nature, a compenſation for the damage muſt not be taken along with the actual reſtitution, as that would neceſſarily induce uſury.

The uſurper of a ſlave, hiring him out to ſervice, is reſponſible for any damage he may ſuſtain, and muſt beſtow the wages in charity;

If a perſon uſurp a ſlave, and hire him out to work, and receive his wages, and the ſlave be thereby affected in his value, in that caſe (upon the principle laid down in the preceding example) the uſurper muſt compenſate for the damage, and muſt beſtow the whole of the wages in charity. The compiler of the *Hedâya* remarks that this is according to *Haneefa* and *Mohammed*; but that according to *Aboo Yooſaf* there is no neceſſity for his beſtowing the wages in charity: and that the ſame diſagreement ſubſiſts with reſpect to the caſe of a borrower hiring out the ſubject borrowed. The reaſoning of *Aboo Yooſaf* is, that the profit in queſtion has been acquired by the uſurper upon his reſponſibility with reſpect to the ſubject, and upon his own property: the former of which, namely reſponſibility, is evident; and ſo likewiſe his right of property; becauſe whatever is a ſubject of reſponſibility becomes the property of the uſurper, in conſequence of his making compenſation, by the way of tranſition. The reaſoning of *Haneefa* and *Mohammed* is, that the profit in queſtion has been acquired by a cauſe in which baſeneſs exiſts, namely, by an exertion over the property of another; and that ſuch profit ought to be beſtowed in charity; becauſe the *cauſe* (that is, the exertion over the property of another) is the trunk, and the profit ſo acquired is a branch from it; and the qualities of the *trunk*, or *original*, communicate with the branches ſpringing from it; whence a baſeneſs exiſts in the *profit* alſo, as well as in the *original*. With regard to what *Aboo Yooſaf* alleges, that "whatever is a ſubject of reſponſibility becomes "the property of the uſurper, in conſequence of his making compenſation, by the way of tranſition," it is anſwered that a right of property eſtabliſhed merely by the way of tranſition is a *defective* right of property, and therefore baſeneſs is not removed by it. If, however, the ſlave be deſtroyed in the poſſeſſion of the uſurper, ſo as to make him liable for his complete value, he may in that caſe give the wages in payment of the compenſation, becauſe the baſeneſs which exiſts with regard to ſuch wages is only on account of the right of the proprietor; (whence, if they were paid to the proprietor, it would be lawful for him to receive and convert them to his own uſe:) they may therefore be paid to him; and, in conſequence of ſuch payment, the baſeneſs which would otherwiſe attach to them is removed. It is different where the uſurper ſells the ſlave, who is afterwards deſtroyed in the poſſeſſion of the purchaſer, and is then proven to be the right of another, for which the purchaſer pays a compenſation, becauſe in ſuch caſe it is not lawful for the uſurper to give the wages to the purchaſer in payment of the price, ſince the baſeneſs which exiſts in the wages is not on account of the right of the purchaſer. Still, however, if the uſurper, in this caſe, be not poſſeſſed of any other property than the wages, he may then lawfully give that to the purchaſer in return for the price which he had taken from him, becauſe under theſe circumſtances the uſurper ſtands in need of it, and he is therefore permitted to apply it to the anſwering of his neceſſities. If, however, he ſhould afterwards acquire other property, he muſt beſtow from it in charity an amount equal to the wages, provided he was rich at the time he made uſe of the price he received from the purchaſer; but if, on the contrary, he was at that time poor, he is not required to beſtow any thing in charity.

(but if the ſlave be *deſtroyed*, the wages may be given in part of the compenſation.)

If

All *monied* profits acquired by means of uſurped money muſt be beſtowed in charity:

If a perſon uſurp one thouſand *dirms*, and with thoſe thouſand purchaſe a female ſlave, whom he afterwards ſells for *two* thouſand, and then with theſe two thouſand purchaſe another female ſlave, whom he again ſells for *three* thouſand, in that caſe the uſurper muſt beſtow in charity the whole of the profit, namely, two thouſand *dirms*. This is according to *Haneefa* and *Mohammed*; and the principle of it is, that whenever either an uſurper or a truſtee perform any act with reſpect to the thing uſurped, or the depoſit, and thereby acquire profit, ſuch profit (according to *Haneefa* and *Mohammed)* is not lawful and ſanctified to them; in oppoſition to the opinion of *Aboo Yooſaf*. The opinion of *Haneefa* and *Mohammed*, in this particular, with regard to a *depoſit*, is evident, ſince the property of it is not referred to a period antecedent to the act of the truſtee; for, as the property cannot be proven from reſponſibility at that time, it follows that the act of the truſtee was not exerted upon his own property. It is to be obſerved, however, that what is here mentioned of the opinion of *Haneefa* and *Mohammed* being evident with regard to a depoſit, alludes to ſuch depoſits only as conſiſt of goods, and not of money; for if the depoſit conſiſt of money, and the truſtee, at the time of purchaſing the female ſlave, ſay "I purchaſe her with this money," (pointing to the identical money in depoſit,) and he accordingly diſcharge the price with that very money, in that caſe the profit muſt be beſtowed in charity; whereas if, on the contrary, at the time of making the bargain, he point to the money in depoſit, and pay the price with other money,—or point to other money, and pay the price with the *depoſited* money,—or, if he ſhould not point to any money, but expreſs himſelf in an abſolute manner, ſaying "I purchaſe this "ſlave for one thouſand *dirms*," (not "for *theſe* thouſand *dirms*,") and he pay the price with the thouſand *dirms* in depoſit,—in all theſe caſes the profit acquired is free and lawful to the truſtee. Such alſo is the opinion of *Koorokhee*; and the reaſon of it is, that by pointing to ſpecific *dirms* at the time of purchaſing, the *dirms* are not thereby rendered fixed and ſpecific, but that, on the contrary, it is lawful for

the

the purchaſer to give other *dirms* than thoſe referred to; and that therefore, in ſuch caſe, the profit acquired is not baſe; excepting when, in purchaſing the ſaid ſlave with the thouſand *dirms* in depoſit, he points to theſe very *dirms*, and pays the price with the ſame.—The *Haneefite* doctors, on the contrary, allege that the profit is not lawful to the truſtee, neither before the giving of compenſation, nor after it: and this is approved; becauſe this law has been recited in an abſolute manner, both in the *Jama Sagheer* and the *Jama Kabeer*, in treating of *Mozáribat*.

but not profits of any different deſcription.

If a perſon purchaſe with one thouſand uſurped *dirms* a female ſlave worth two thouſand, and make a gift of her to any perſon; or purchaſe wheat with the ſaid thouſand, and eat the ſame; he is not, under ſuch circumſtances, required to beſtow any thing in charity. This is a caſe in which all are agreed; and the principal of it is, that although the female ſlave be worth two thouſand *dirms*, yet ſhe is not of the ſpecies of *dirms*, ſo as to occaſion uſury; for uſury does not take place excepting when the profit is of the ſame deſcription as the principal.

SECTION.

Of uſurped Articles altered by Acts of the Uſurper.

An alteration wrought upon the article uſurped veſts the property of it in the uſurper; who remains re-

Whenever an article uſurped is altered in conſequence of an act of the uſurper, in ſuch a manner that it loſes both its name and its original purpoſe, it is then ſeparated from the right of the proprietor, and becomes the property of the uſurper, and the uſurper becomes reſponſible for it; but he is not entitled to derive any advantage from it

Digitized by Google

ſponſible to the original owner for the value of it; and cannot lawfully derive any advantage from it, until ſuch compenſation be paid.

it until he pay the compenſation. An example of this occurs where a perſon uſurps a goat, kills it, and afterwards roaſts or boils it; or uſurps wheat, and afterwards grinds it into flour;—or uſurps iron, and makes a ſword from it;—or uſurps clay, and makes a veſſel from it. What is here advanced is according to our doctors. *Shafeï* maintains that, after the alteration in the article, the right of the proprietor to it is not extinguiſhed, but he is entitled to take from the uſurper the flour of his wheat. There is alſo a report from *Aboo Yooſaf* to the ſame effect. He, however, maintains that in caſe the proprietor chuſe to take the flour of the wheat, he is not entitled to a compenſation for the damage, as that would induce uſury; whereas *Shafeï* holds that he is entitled to a compenſation from the uſurper for the damage. It is alſo related, as an opinion of *Aboo Yooſaf*, that the right of property with reſpect to an uſurped article which has been altered ceaſes in the proprietor, but that it may be ſold to anſwer the debt due to him, (namely, the compenſation,) and that, in caſe of the death of the uſurper, he has a preferable claim to the other creditors with reſpect to the article in queſtion. The reaſoning of *Shafeï* is, that the ſubſtance of the thing being extant, notwithſtanding it have undergone an alteration, it follows that the right of property ſtill remains in the proprietor, ſince the quality is merely a dependant on the ſubſtance;—as where, for inſtance, the wind blows wheat into the mill of another perſon, and it is ground into flour; in which caſe it continues the property of the original proprietor of the wheat; and ſo alſo in the caſe in queſtion. With reſpect to the act of the uſurper by which the thing is altered, it is not to be regarded, ſince it is an unlawful act, and conſequently incapable of becoming the cauſe of property, as has been explained in its proper place. The caſe is therefore the ſame as if the act had never exiſted;—in the ſame manner as holds where an uſurper kills an uſurped goat, and tears the ſkin of it in pieces. The argument of our doctors is, that in the caſe in queſtion the uſurper has performed an operation which bears a value, and has therefore deſtroyed the right of the proprietor in one reſpect, inaſmuch as the appearance is no longer the ſame, whence it is that the name is changed, and many of the original purpoſes of the article defeated; as grains of wheat, for inſtance, which are fit for being ſown or roaſted, but after being converted into flour are no longer fit for theſe purpoſes. In ſhort, by the alteration of an article uſurped the right of the proprietor is deſtroyed in one ſhape, and that of the uſurper with reſpect to the *qualities* is eſtabliſhed in *every* ſhape; and hence the right of the uſurper has a ſuperiority with reſpect to the original of that thing which has been in one ſhape deſtroyed. (With reſpect to the act of the uſurper, it is not made the occaſion of property becauſe of its illegality, but becauſe of its being the performance of a valuable operation. It is otherwiſe with regard to a goat ſlain by the uſurper, and the ſkin of it torn to pieces; for, after the killing of a goat, and the deſtruction of its ſkin, the name of *goat* is ſtill retained, ſince it is common to ſay "*a ſlaughtered goat.*" With reſpect to what has been recited, that "the uſurper is not entitled to derive "any profit from the article until he pay the compenſation," it is according to a favourable conſtruction of the law. Analogy would lead us to conclude that it is lawful to derive a profit from the article before the payment of a compenſation. This is the opinion of *Haſſan* and *Ziffer*, and there is alſo a report to that effect from *Haneefa*, of which the relater is the lawyer *Aboo Lays*. The reaſon derived from analogy is becauſe, after the alteration, the uſurper becomes the proprietor of the thing, and may therefore perform any act with reſpect to it, or derive profit from it, in the ſame manner as he might lawfully give it away or ſell it. The reaſon, however, for a more favourable conſtruction is, that in the days of the prophet a goat having been killed and roaſted without the conſent of the proprietor, the prophet ordered that the priſoners ſhould be fed with it, meaning, that it ſhould be beſtowed in *charity* upon them. Now this order of the prophet evinces that upon an alteration in the ſtate of an article uſurped, it is ſeparated from the property of the proprietor, and that it is unlawful for the uſurper to derive a profit from it until he have ſatisfied the proprietor. Moreover, if it were lawful to the uſurper under theſe circumſtances to take a profit, a door would be opened for uſurpation; and, therefore, to prevent ſuch miſchievous conſequences, the acquiſition of a profit before ſatisfaction being made is not permitted. With reſpect to the aſſertions of *Haſſen* and *Ziffer* adduced in ſupport of their opinion, that "the *gift* or the *ſale* of the thing is lawful;" it is anſwered, that notwithſtanding the illegality of deriving profit from the article uſurped, ſtill the ſale or gift of it is lawful, becauſe the article in queſtion is the *property* of the uſurper, and the gift or ſale of property held under an invalid right is lawful. Where, however, the uſurper makes a compenſation for the thing uſurped, he is entitled to derive an advantage from it, becauſe the right of the proprietor has been transferred to him in conſequence of his making compenſation; and it becomes the ſame as an exchange between the uſurper and the proprietor with their mutual conſent. In the ſame manner, alſo, he is entitled to derive profit from the thing in queſtion when the proprietor exempts him from reſponſibility for it; becauſe in conſequence of ſuch exemption the right of the proprietor ceaſes; and ſo likewiſe where the proprietor *takes* the compenſation from the uſurper, or where he demands it and the uſurper aſſents thereto, as in that caſe the conſent of the proprietor is obtained; and ſo alſo where the *Kâzee* paſſes a decree directing the uſurper to pay a compenſation to the proprietor,—or where the uſurper pays the compenſation upon the decree of the *Kâzee*, becauſe in that caſe likewiſe the conſent of the proprietor is obtained, ſince the *Kâzee* paſſes the decree at his ſuit. It is to be obſerved that in the ſame manner as a diſagreement ſubſiſts between our doctors and *Shafeï* concerning theſe caſes, ſo likewiſe with reſpect to the caſe of a perſon uſurping wheat and ſowing it, or uſurping the ſtones of dates and planting them. In the opinion of *Aboo Yooſaf*, however, it is lawful even in theſe caſes for an uſurper to enjoy profit before the payment of compenſation, becauſe in both theſe caſes the uſurper has deſtroyed the ſubſtance of the thing uſurped in every reſpect. It is otherwiſe in the caſes before recited; for in thoſe

Digitized by Google

thoſe inſtances the uſurper is not entitled to derive profit, ſince there the ſubſtance of the article continues in one reſpect extant. In the caſe, therefore, of ſowing uſurped wheat, it is not neceſſary (according to *Aboo Yooſaf*) to beſtow in charity ſuch part of the produce of it as exceeds the quantity ſown and the expence of the labour; contrary to the opinion of *Haneefa* and *Mohammed*, as has been already explained.

Any alteration wrought upon gold or ſilver does not transfer the property of it.

If a perſon uſurp gold or ſilver, and convert it into *dirms* or *deenars*, or make a veſſel from it, ſuch ſilver or gold does not ſeparate from the property of the proprietor, according to *Haneefa*,—whence he is entitled to take it from the uſurper without giving him any compenſation. The two diſciples maintain that the uſurper, in ſuch caſe, acquires a property in the metal, and owes a compenſation of a ſimilar quantity of gold or ſilver to the original proprietor; becauſe he has performed a valuable operation upon the metal, which in one ſhape deſtroys the right of the proprietor, ſince in ſo doing he has broken it down ſo as to deſtroy its original purpoſes, inaſmuch as *bullion* is unfit to become the ſtock in a contract of *Mozâribat*, or of partnerſhip, whereas coined money has this fitneſs. The reaſoning of *Haneefa* is, that in the caſe in queſtion the ſubſtance of the thing uſurped is extant in every reſpect, inſomuch that it ſtill preſerves its name; and the purpoſes to which gold and ſilver relate, ſuch as price and weight, are alſo extant, inſomuch that uſury by weight takes place in them when coined, in the ſame manner as before coinage.—With regard, moreover, to the fitneſs of them (when coined) for conſtituting ſtock, it is an effect of the workmanſhip, and not a quality inherent in the *ſubſtance* of the thing. Beſides, the workmanſhip in queſtion does not always increaſe the value, but is ſometimes attended with value, and ſometimes not; as where, for inſtance, genus is oppoſed to genus,—in which caſe workmanſhip is of no value.

The conſtruction of a building upon an uſurped beam transfers the property of the beam to the uſurper.

If a perſon uſurp a beam, and build a houſe upon it, the beam is in that caſe ſeparated from the property of the proprietor, and the uſurper muſt make a compenſation to him for the value of it. *Shafeï* maintains that the proprietor is entitled to take it. The arguments of the two parties on this point have been already recited; but in this caſe there is another reaſon in addition to thoſe of our doctors, namely, that if (according to the opinion of *Shafeï*) the proprietor were to take the beam, an injury would reſult to the uſurper, as his houſe would thereby be demoliſhed without his receiving any compenſation.—Where, on the contrary, (according to the opinion of our doctors,) the beam is ſeparated from the property of the proprietor, and becomes the property of the uſurper, although an injury be thereby occaſioned to the proprietor, yet that is done away by the uſurper making compenſation. The caſe is, therefore, analogous to one where an uſurper ſows the belly of his male or female ſlave with an uſurped thread *, or inſerts an uſurped plank into his own boat; for in theſe caſes the proprietor is not permitted to take away the thread or the plank, but is entitled to a compenſation for their value.

In the caſe of ſlaying an uſurped animal, the proprietor has an option of taking the carcaſe, (receiving a compenſation for the damage,) or making it over to the uſurper for the value.

If a perſon uſurp and ſlay the goat of another, the proprietor has it in that caſe at his option either to take a compenſation for the value from the uſurper, making over the goat to him, or to keep the goat, receiving from the uſurper a compenſation for the damage done by ſlaughtering it. Such alſo is the law with reſpect to a camel; or where a perſon cuts off one of the legs of a goat or camel belonging to another. This is according to the *Záhir Rawáyet*; and the reaſon of it is, that a deſtruction of the animal is occaſioned in one reſpect in a termination of many of its uſes, ſuch as milk, and progeny, and the tranſportation of burdens, whilſt ſome of its uſes ſtill continue, ſuch as that of the *fleſh*, for inſtance; whence the caſe is ſimilar to that of a large rent in cloth. If, however, a perſon ſlay or cut off the leg of a quadruped of which the fleſh is not edible, the proprietor is entitled to take from him a compenſation for the whole of the value; for in ſuch caſe the ſlaying or maiming is in every reſpect a deſtruction. It is otherwiſe where an uſurper cuts off the hand or foot of a male or female ſlave; for in that caſe the proprietor muſt receive back the ſlave, together with the fine, ſince the capability of yielding profit ſtill exiſts in man after the loſs of a foot or a hand.

---

* This is the literal meaning in both the *Arabic* and *Perſian* verſion; but what cuſtom or particular operation it alludes to, the tranſlator has not been able to diſcover.

A *ſmall* damage committed upon uſurped cloth does not transfer the property of it; but a *conſiderable* damage gives the proprietor an option of taking it back, (with a compenſation for the damage,) or making it over to the uſurper for the value.

If a perſon tear a piece of cloth, the property of another, ſo as to occaſion a *ſmall* rent in it, he is in that caſe reſponſible for the damage, and the cloth remains with the proprietor, ſince the ſubſtance of it is extant in every reſpect, nothing more having happened to it than a *defect*;—whereas, if the rent were large, ſo as to deſtroy many of its uſes, the proprietor would in that caſe have it in his option either to take the whole of the value from the uſurper and give him the cloth, (ſince he has deſtroyed it in every reſpect, even as much as if he had burnt it,) or to keep the cloth and take a compenſation for the damage; becauſe a large rent is in one reſpect merely a *defect*, inaſmuch as the ſubſtance of the cloth is ſtill extant, as well as ſome of its *uſes* likewiſe. It is to be obſerved that what is recited by *Kadooree* upon this ſubject, implies that a *large* rent is ſuch as occaſions a deſtruction of *many* of the advantages. In fact a *large* rent is ſuch as occaſions a deſtruction of ſome of the parts of the cloth, and alſo of ſome of its uſes; ſome of the parts and ſome of the uſes ſtill remaining, (as where, for inſtance, before the accident of the rent, the cloth was capable of being made into an upper or under garment, and afterwards loſes that capability;) whereas a ſmall rent is ſuch as does not induce a deſtruction of any of the uſes, but merely occaſions a damage; for *Mohammed*, in the *Mabſoot*, has ſaid "the cutting of a garment is a great damage, "notwithſtanding it occaſion only a deſtruction of ſome of the "uſes."

If

Caſe of planting or building upon uſurped land.

If a perſon uſurp land, and plant trees in it, or erect a building upon it, he muſt in that caſe be directed to remove the trees and clear the land, and to reſtore it to the proprietor; becauſe the prophet has ſaid "*there is no right over the ſeed of the oppreſſor,*" (alluding to the planting of trees;) and alſo, becauſe the property of the proprietor ſtill exiſts as it did before, ſince the land has not been deſtroyed, nor has the uſurper become proprietor, inaſmuch as he cannot become the proprietor but by ſome one of the cauſes which eſtabliſh property, of which none here exiſt. In this caſe, moreover, uſurpation is not eſtabliſhed*; and therefore the perſon who has ſo employed the land of another is ordered to clear and reſtore it to the owner, in the ſame manner as in the caſe of his putting his food into the veſſel of another. If, however, the removal of the trees or the building be injurious to the land, the proprietor of the land has, in that caſe, the option of paying to the proprietor of the trees or the building a compenſation equal to the value they would bear when removed from the ground, and thus poſſeſſing himſelf of them; becauſe in this there is an advantage to both, and the injury to both is obviated. By the expreſſion "paying a compenſation equal to the value they would bear when "removed," is to be underſtood *paying the value which the trees or houſe bear upon the proprietor being directed to remove them*; becauſe his right exiſts only with reſpect to the trees or building "*as required* "*to be removed,*" ſince he is not at liberty to leave them upon the ground. It is therefore requiſite to appreciate the land *without* the trees or the building, and afterwards to appreciate it *with* the trees or building, (as removeable at the landholder's deſire;) and whatever may be the exceſs of the ſecond appreciation over the firſt is the amount of the compenſation which the proprietor of the land is required to pay to the proprietor of the trees or building.—(It is to be obſerved that the value of trees or of a building which are liable or required to be removed is leſs than that of trees or a building which are permitted to ſtand, ſince the expence of removal muſt be deducted from the value of trees or buildings which are removeable.)

---

* There appears, at firſt ſight, a ſort of incongruity in opening the caſe "If a perſon "*uſurp*, &c." and then ſaying "uſurpation is not eſtabliſhed."—The expreſſion, however, only means that "uſurpation, *in the ſenſe of the* LAW, *as requiring atonement*, is not "eſtabliſhed," the reaſon of which is, that uſurpation cannot take place with reſpect to fixed property, as has been already explained; ſee p. 526.

Caſe of dying uſurped cloth; or, grinding uſurped wheat into flour.

If a perſon uſurp the cloth of another and then dye it red, or the flour of another and then mix it with oil, in that caſe the proprietor has the option of taking from the uſurper a compenſation equal to the value of the white cloth, or an equal quantity of flour, giving the red cloth or the mixed flour to the uſurper,—or, of taking the red cloth or the mixed flour, giving to the uſurper a compenſation equal to the additional value theſe articles may have acquired from the red dye, or the mixture of oil. *Shafeï* maintains that in the caſe of dyed cloth the proprietor of it has a right to take it, and then to tell the uſurper to ſeparate and take, to the utmoſt of his power, his dye from it; for he holds this caſe to be analogous to that of a plot of ground; (in other words, if a perſon uſurp a piece of ground belonging to another, and afterwards erect a building upon it, the proprietor is entitled to take the ground, deſiring the uſurper to dig up and carry away his building;) becauſe the ſeparation of a dye from ſtained cloth is equally practicable with the removal of a building from the ground on which it ſtands. It is otherwiſe in the caſe of oil mixed in flour, becauſe the ſeparation of the oil is then impracticable. The argument of our doctors is that, in what they have advanced on this point, an attention is ſhewn to the intereſts of both parties, an option, however, being allowed to the proprietor of the cloth, as he is the original. It is otherwiſe in the caſe of a plot of ground; for in that inſtance the uſurper is entitled to the fragments of the houſe after its being pulled down (that is, to the bricks, wood, &c.) whereas a dye, when ſeparated from cloth, is loſt, and cannot be collected by the uſurper of the cloth. It is alſo otherwiſe in the caſe of a garment blown by the wind into the vat of a dyer, and becoming ſtained in conſequence; for in that caſe the dyer is not reſponſible for the garment: on the contrary, the proprietor of the garment muſt take it ſo ſtained, and pay to the dyer the value of his dye, as in this caſe no degree of blame is imputable to him. It is to be obſerved that *Aboo Aſſama* has ſaid that when a perſon uſurps the cloth of another, and dyes it, the proprietor of the cloth may, if he pleaſe, ſell it, and deduct from the price a proportion equal to the value of the white cloth, and give to the dyer a proportion equal to the value of his dye; for as the proprietor of the cloth has it in his power to refuſe taking the dye and paying a compenſation for its value, it follows that when he *does* refuſe to take it, the cloth muſt be ſold, that he may receive his proportion, and that the intereſts of both may be attended to. This reaſoning of *Aboo Aſſama* equally holds in the caſe where a garment is ſtained in conſequence of being blown by the wind into the veſſel of a dyer; and in the ſame manner, the reaſoning adduced in the caſe of cloth equally holds in the caſe of flour. As flour, however, is of the claſs of ſimilars, it muſt be compenſated for by a ſimilar; whereas cloth, as being an article of price, muſt be compenſated for by a payment of its value. *Mohammed*, in the *Mabſoot*, has ſaid that flour muſt alſo be compenſated for by value, becauſe flour is altered by being baked, and is no longer of the claſs of ſimilars. (Some have explained the meaning of the *value* of flour to be *a ſimilar quantity*; and that *Mohammed* has uſed the term *value* inſtead of *ſimilar*, becauſe a *ſimilar* is an *equivalent*, in the ſame manner as *value*.) It is to be obſerved that a yellow dye is the ſame as a red dye; but that with regard to a black dye there is a difference of opinion; *Haneefa* holding it to be a defect, whereas the two diſciples maintain that it is not a defect, but, on the contrary, the cauſe of additional value. Some have ſaid that this difference of opinion ariſes from the different periods of time; and others have ſaid that if the cloth be of ſuch a nature that a black dye occaſions a diminution of its value, the dying of it muſt in that caſe be conſidered as a damage or defect; but that if it be of ſuch a kind as to receive an *in-*

creaſe of value from a black dye, the black dye is the ſame as a *red* dye. If, however, the uſurped cloth be of ſuch a nature that a red dye occaſions a diminution of its value, (as if, for inſtance, the value of it having been thirty *dirms*, it ſhould, after receiving the red dye, be worth only twenty *dirms*,) in that caſe it is related as an opinion of *Mohammed*, that regard muſt be had to the *additional* value which the red dye may have occaſioned in ſome other piece of cloth; and if it amount to five *dirms*, that then the proprietor of the cloth has a right to take it, and to receive, beſides, five *dirms* from the uſurper; for the proprietor of the cloth is entitled to a compenſation of ten *dirms* from the uſurper for the amount of the damage occaſioned to his cloth; and the uſurper is entitled to five *dirms* from the proprietor as the value of his dye, having operated that increaſe upon *another* piece of cloth. Hence the proprietor is entitled to take five *dirms* from the uſurper, and the remaining five is cancelled by the value of the dye thus eſtimated at five *dirms*.

SECTION.

An uſurper, damaging the article uſurped, becomes proprietor of it upon the owner demanding the value;

If a perſon uſurp any article of goods or furniture*, and damage it, and the proprietor demand a compenſation for the value from the uſurper, he [the uſurper] in that caſe becomes the proprietor of ſuch article, according to our doctors. *Shafeï* maintains that the uſurper does not become proprietor, becauſe the act of uſurpation, as being oppreſſive and illegal, is therefore incapable of occaſioning a right of property; in the ſame manner as where a perſon uſurps a *Modabbir*, and injures him, and the proprietor takes from him the value of the *Modabbir* as a compenſation for the injury,—in which caſe he [the uſurper] does not thence become proprietor of the *Modabbir*. The reaſoning of our doctors is, that in the caſe in queſtion the proprietor of the article obtains a return for it; and as the article uſurped is fit to be ſhifted from the property of one perſon to that of another, the uſurper becomes the proprietor of it, in order to remove the injury he would otherwiſe ſuſtain. It is different with reſpect to a *Modabbir*, as he is not fit to be removed from the property of one perſon to that of another. (The contract of *Tadbeer*, however, is ſometimes annulled by order of the *Kázee*; in which caſe the ſale of the *Modabbir* is lawful, as it then is the ſale of mere *property*, ſince he becomes ſuch by the annulment of the contract.)—It is to be obſerved that, in aſcertaining the value of the article uſurped, the aſſertion of the uſurper, confirmed by an oath, is to be credited, ſince the proprietor is the claimant of a large value, and the uſurper is the denier of the ſame, and the aſſertion of the denier upon oath muſt be admitted;—unleſs, however, the proprietor bring evidence in ſupport of his claim; for then the aſſertion of the proprietor muſt be credited, as being ſupported by evidence, which is convincing proof.—If, therefore, the ſubſtance of the article uſurped appear or be found at a period when the value of it is greater than the compenſation given by the uſurper, and ſuch compenſation have been given in conſequence of the claim of the proprietor, or of evidence adduced by him, or of the non-denial of the uſurper,—the proprietor, in that caſe, has not the option of taking the ſubſtance of the thing uſurped: on the contrary, it remains the property of the uſurper, ſince his property in it has been rendered complete in conſequence of a cauſe conjoined with the conſent of the proprietor, inaſmuch as he claimed that extent of value;—whereas if, on the contrary, the proprietor have taken a compenſation in conſequence of the aſſertion of the uſurper, corroborated by an oath, he has in that caſe the option either to adhere to the compenſation he has taken, or to take the ſubſtance of the article uſurped, and reſtore to the

---

* Arab. *Rakht wa Mattâ*; *houſehold-ſtuff*, &c. as oppoſed to *Mâl*.—The diſtinction is fully explained elſewhere.

the amount of which is aſcertained by the declaration of the uſurper upon oath,—or by evidence adduced by the proprietor;

and after accepting this, the proprietor cannot remand the article, if the compenſation be given in conformity with his claim.

Digitized by Google

the uſurper the compenſation he may have taken; for under ſuch circumſtances the conſent of the proprietor was not complete with reſpect to the quantity, ſince he claimed a larger quantity, but was obliged to take the quantity in queſtion from his want of proof to eſtabliſh the other. If, on the other hand, the ſubſtance of the article uſurped be found at a period when its value is equal to, or leſs than, the compenſation taken,—and the proprietor ſhould have taken the compenſation in conformity with the aſſertion or oath of the uſurper, the law (according to the *Zâhir Rawâyet*) is the ſame as already recited; that is, the proprietor has the option of either adhering to the compenſation he had taken, or of taking back from the uſurper the ſubſtance of the article, and reſtoring to him the amount of the compenſation. This is approved; becauſe the conſent of the proprietor to take the compenſation in queſtion was not complete, inaſmuch as he claimed a larger ſum, which he did not get, and hence he has the option, becauſe of the non-exiſtence of his conſent.

The ſale of an uſurped ſlave by the uſurper is valid upon the owner receiving the value as a compenſation;—but the *emancipation* of him would be invalid.

If a perſon uſurp a ſlave, and ſell him, and the proprietor take the value of him from the uſurper as a compenſation, the ſale is in that caſe valid. If, on the contrary, the uſurper *emancipate* the ſlave, and the proprietor afterwards take a compenſation, the emancipation is not valid; becauſe the right of property eſtabliſhed in the uſurper by his paying the compenſation is defective, as being eſtabliſhed by a retroſpective reference, from a principle of neceſſity; (whence it is that the right of property in an uſurper takes place with reſpect to earnings of labour, but not with reſpect to progeny;—in other words, if a perſon uſurp a female ſlave, and take to himſelf the earnings of her labour, and afterwards pay a compenſation to the proprietor, the earnings are in that caſe his property; but if ſhe ſhould bear children whilſt in his poſſeſſion, and he afterwards pay a compenſation to the proprietor, the children are not his property.)—In ſhort, the right of property eſtabliſhed in a uſurper in virtue of his payment of compenſation is

Digitized by Google

defective; and a defective right of property is ſufficient to legalize ſale, but not emancipation; in the ſame manner as the right of property eſtabliſhed in a *Mokâtib* with reſpect to the earnings of his labour is defective; yet if he ſhould ſell a ſlave whom he may have earned by his labour it is valid; whereas if he were to *emancipate* him, the emancipation would be invalid.

The *produce* of an uſurped property is a *truſt* in the uſurper's hands.

The fruit of an uſurped orchard, and the children of an uſurped female ſlave, together with their produce, (ſuch as their increaſe of ſtature and beauty,) are a truſt in the hands of the uſurper. If, therefore, they be deſtroyed, he is not reſponſible for them;—unleſs, however, he ſhould have committed a treſpaſs with regard to them, or refuſed to anſwer the demand of the proprietor to deliver them up to him; for in theſe caſes he is reſponſible. *Shafeï* maintains that the increaſe of an article uſurped, whether it be conjoined (ſuch as increaſe of ſtature or of beauty) or ſeparated (ſuch as progeny,) is a ſubject of reſponſibility; becauſe uſurpation is eſtabliſhed with reſpect to it; for uſurpation means *the eſtabliſhment of poſſeſſion over the property of another without the conſent of that other*; and as this definition applies equally to any increaſe which may accrue upon ſuch property, it is therefore a ſubject of reſponſibility, although the uſurper have not diſpoſſeſſed the proprietor of it; in the ſame manner as the fawn is a ſubject of reſponſibility, in a caſe where a perſon takes a deer out of an incloſure *; and it afterwards brings forth whilſt in his poſſeſſion, notwithſtanding that it [the fawn] had not before been in the poſſeſſion of any one, ſo as to eſtabliſh a diſpoſſeſſion. The reaſoning of our doctors is, that uſurpation means "the eſtabliſhment of poſſeſſion "over the property of another, *ſo as to deſtroy the poſſeſſion of the*

---

* In the text the caſe is ſuppoſed that of a *pilgrim* driving a deer out of the ſacred territory round *Mecca*.—The tranſlator has hazarded a ſmall deviation from the original in this inſtance, merely with a view to familiarize the alluſion in the mind of an *European* reader.

"*proprietor*," (as has been already explained.) Now the poſſeſſion of the proprietor had not been eſtabliſhed, with reſpect to the *increaſe*, ſo as to admit the deſtruction of it. Beſides, if the poſſeſſion of the proprietor with regard to the increaſe be admitted by way of dependancy on his property, ſtill his poſſeſſion continues, and the uſurper has not deſtroyed it; for it is apparent that the uſurper has not hindered him from taking his increaſe;—yet if he refuſe to give it to him upon his demand, he is then reſponſible to him for it; in the ſame manner as where he commits a treſpaſs with regard to it, by deſtroying it, or killing and eating it, or ſelling it and delivering it to the buyer.—With reſpect, moreover, to the fawn before mentioned, it is not a ſubject of reſponſibility when deſtroyed prior to the ability of the treſpaſſer to place it in the incloſure, becauſe he is not, before that, guilty of any obſtruction or hinderance;—in ſhort, he is liable to reſponſibility only where he deſtroys the fawn after his ability to place it in the incloſure; and this becauſe he is then guilty of an obſtruction after the eſtabliſhment of the claimant's right *.

The uſurper of a female ſlave is not liable for any damage ſhe may receive by bearing a child, provided the value of the child be adequate to ſuch damage.

If a female ſlave be injured by bearing a child whilſt in the poſſeſſion of the uſurper, and the value of the child be equal to the damage ſuſtained, the uſurper is not liable for a compenſation. *Shafeï* and *Ziffer* maintain that the value of the child cannot be made a remedy for the injury; becauſe the child is the property of the proprietor of the ſlave; and conſequently cannot be applied to remedy the damage ſuſtained by her;—in the ſame manner as in the caſe of the fawn above recited;—that is to ſay, if a perſon drive a deer out of an incloſure, and ſhe then bring forth a young one, and be injured by ſuch delivery, and the value of the young be adequate to the damage, in that caſe the perſon is not only obliged to reſtore the deer and its

---

* A ſmall portion of the text is here omitted, as it relates merely to the prohibition againſt treſpaſſing upon game in the ſacred territory, (round *Mecca*,) a ſubject the diſcuſſion of which is of little importance to the point in queſtion, and which is treated of at large elſewhere.—(See *Seyid*)

young one to the incloſure, but muſt alſo make good the damage ſuſtained. It is alſo the ſame where the child dies prior to the uſurper's reſtoration of the mother; or where the mother dies in conſequence of the delivery of the child, and the value of the child is adequate to remedy the loſs; or where a perſon ſheers the wool of a ſheep belonging to another, or lops off the branches of a tree belonging to another, or caſtrates the ſlave of another, or teaches him the knowledge of ſome art in conſequence of which he is rendered in any reſpect defective *;—for in all theſe caſes the perſon ſo acting is reſponſible for the injury, notwithſtanding the value of the article be increaſed in conſequence. The arguments of our doctors are that, in the inſtance in queſtion, the cauſe of the increaſe and of the injury is the ſame, namely, childbirth;—and ſuch being the caſe, the injury is not taken into the account, becauſe, in oppoſition to it, an increaſe has been obtained. Hence an injury of this nature does not occaſion reſponſibility; it being, in fact, analogous to where a perſon uſurps a fat female ſlave, who afterwards becomes lean, and then grows fat again; or who loſes two of her fore teeth, and then acquires two new ones;—or where a perſon cuts off the hand of an uſurped ſlave whilſt in the poſſeſſion of the uſurper, and the uſurper receives the fine from him, and gives it with the ſlave to the proprietor;—for in all theſe caſes no compenſation for the injury is incumbent upon the uſurper.—With reſpect to the caſe of the fawn, as adduced by *Ziffer* and *Shafeï*, it is not admitted as applicable.—With reſpect, moreover, to the death of the mother, in conſequence of her delivery, (as alſo adduced by them,) there are two opinions on record.—The firſt is, that if the value of the child be adequate to remedy the injury, it is then taken as ſuch; and the ſecond (which is according to the *Zâhir Rawâyet*) is, that the value of the child cannot be taken as a compenſation for the injury, for this reaſon, that the delivery is not to be conſidered as the cauſe of the mother's death, ſince delivery is not neceſſarily connected with death, being more frequently attended with ſafety. Where, on the other hand, the child dies prior to the reſtoration of the mother, the injury is not remedied; becauſe there was a neceſſity for the reſtoration of the original (namely, the mother) in the condition in which ſhe was at the period of uſurpation; and as ſhe afterwards ſuſtained an injury by the birth of a child, and the fruit of the injury (namely, the child) cannot, becauſe of its death, be given along with the mother, it follows that the mother is not reſtored in the condition in which ſhe was at the period of uſurpation. With reſpect to the caſtration of a ſlave, it is not an increaſe, being an object only with ſome looſe people;—and as to the other inſtances adduced by *Ziffer* and *Shafeï*, the cauſe in them of the increaſe and the damage is not one and the ſame thing; for the cauſe of damage in a tree is the cutting off its branch, whilſt the cauſe of increaſe is the growth; the cauſe of damage in a ſheep is the ſheering of its wool, whilſt the cauſe of increaſe is the growth of the animal; and the cauſe of damage in the ſlave is the teaching or inſtructing him, whilſt the cauſe of increaſe is the intellect of the ſlave.

---

* That is, defective in regard to the purpoſe for which his maſter had intended him; as by a loſs of health, or any accident ſuſtained in the courſe of his learning the art.

The uſurper of a female ſlave, impregnating her, is reſponſible for her value, in caſe ſhe die of child-birth after reſtoration.

If a perſon uſurp a female ſlave, and cohabit with her, and ſhe become pregnant, and he reſtore her in that ſtate to the proprietor, and ſhe then die of child-birth, the uſurper muſt in that caſe pay a compenſation equal to the value which ſhe bore on the day of her impregnation; whereas, if ſhe were free, no compenſation would be required, according to *Haneefa*. The two diſciples maintain that neither is any compenſation due in the caſe of her being a ſlave. The arguments of the two diſciples are that, in the caſe in queſtion, upon the uſurper reſtoring the ſlave to the proprietor, and the reſtoration being made valid and complete, the proprietor is held to have received her into his property; and as, afterwards, the diſorder of which ſhe dies, namely, child-birth, is thus conſidered to have happened to her whilſt in the poſſeſſion of the proprietor, the uſurper is, therefore, not liable for her; in the ſame manner as where an uſurped female ſlave, having been ſeized with ſome diſorder, ſuch as a fever, the uſurper reſtores her in that condition to the proprietor, and ſhe afterwards dies in his poſſeſſion; or where an uſurped female ſlave commits whoredom with ſome perſon whilſt in the uſurper's poſſeſſion, and he reſtores her to the proprietor, and ſhe afterwards ſuffers puniſhment for whoredom, and dies of the ſame; in neither of which caſes is the uſurper reſponſible, any more than a ſeller, in the caſe of his ſelling a pregnant female ſlave, who afterwards dies of childbirth in the poſſeſſion of the purchaſer. The arguments of *Haneefa* are, that as the uſurper, in the caſe in queſtion, uſurped the female ſlave at a time when the cauſe of deſtruction did not exiſt in her, and reſtored her at a period when ſuch cauſe *did* exiſt in her, he therefore has not reſtored her in the ſtate in which he took her:—conſequently, the reſtoration was not valid and complete, being, in fact, the ſame as if an uſurped female ſlave, having committed a crime in the uſurper's poſſeſſion, ſhould afterwards, on account of ſuch crime, be put to death whilſt in the poſſeſſion of the proprietor,—or be given up to the avenger of the offence, in conſequence of her having committed the crime *inadvertently*, inſtead of *wilfully*,—in either of which caſes the proprietor is entitled to take the whole of the value from the uſurper, and ſo alſo in the caſe in queſtion. It is otherwiſe where the woman uſurped is free; becauſe no reſponſibility takes place from the uſurpation of a free woman, and conſequently the uſurper is not reſponſible after the reſtoration, although ſuch reſtoration were invalid. With reſpect to what has been alleged of the purchaſe of a pregnant female ſlave, it is anſwered, that the delivery not having been incumbent upon the ſeller on account of his having before taken her, ſo as to require a delivery in the ſtate in which he had taken her, (which is a condition of validity in the caſe of uſurpation,) it follows that the analogy here does not hold good. With reſpect, alſo, to the caſe of an uſurped female ſlave committing whoredom, and dying in conſequence of the puniſhment on that account inflicted upon her, the anſwer is, that whoredom merely occaſions *ſcourging*, which is a cauſe of *pain*, but not of *death*; and therefore, in this caſe, a cauſe of *deſtruction* did not take place whilſt the ſlave was in the poſſeſſion of the uſurper.

There is no hire for the uſe of an uſurped article; but the uſurper is reſponſible for any damage it may ſuſtain.

An uſurper is not reſponſible for the uſe of the article uſurped*; but if it be injured he is reſponſible for the damage. *Shafeï* maintains that an uſurper is liable for the uſe of a thing uſurped, and conſequently, that he owes an adequate rent or hire for it. It is to be obſerved that there is no difference between the doctrine of *Shafeï* and that of our doctors, in the caſe where a perſon uſurps a houſe and leaves it unoccupied, or occupies it himſelf; for in ſuch caſe, according to both doctrines, the uſurper is not liable for the uſe of it.—*Málik* maintains that if the uſurper himſelf occupy the houſe he is reſponſible for an adequate rent; but not in caſe of his leaving it unoccupied. The argument of *Shafeï* is that the *uſe* of property is eſtimable, (whence it is a ſubject of reſponſibility from contracts and agreements,) and conſequently is a ſubject of reſponſibility from uſurpation. The arguments of our doctors on this point are twofold.—First, the uſe of an article uſurped is obtained by the uſurper in conſequence of its occurring during his occupancy; (for it had not exiſted in the hands of the proprietor, as *uſe* is a paſſing accident which does not endure;) and ſuch being the caſe, he is entitled to it, and conſequently is not reſponſible for it, as no man is reſponſible for that to which he is entitled.—Secondly, there is no ſimilarity between uſe and property, ſuch as *dirms* and *deenars*; for uſe is an accident, whereas property is a ſubſtance. Uſe, therefore, cannot be a ſubject of reſponſibility in ſubſtantial property; becauſe a ſimilarity is requiſite between the compenſation and the thing for which the compenſation is given.—With reſpect to the aſſertion of *Shafeï*, that "the uſe of "property is eſtimable," it is not admitted, uſe being conſidered as eſtimable only in the caſe of contracts of hire, from neceſſity; but in the caſe of uſurpation there exiſts no contract whatever.—Where, however, the article uſurped is damaged, whilſt in the poſſeſſion of the uſurper, in conſequence of his uſe of it, a compenſation for the damage is incumbent upon him, becauſe of his having deſtroyed part of the ſubſtance of the thing uſurped.

---

* Meaning, *he does not owe any* HIRE *for the uſe*.

SECTION.

Of the Uſurpation of Things which are of no Value.

A *Muſſulman* is reſponſible for deſtroying the wine or pork of a *Zimmee*;

IF a *Muſſulman* deſtroy wine or pork belonging to a *Zimmee*, he muſt compenſate for the value of the ſame; whereas, if he deſtroy wine or pork belonging to a *Muſſulman*, no compenſation is due.—*Shafeï* maintains that in the former caſe alſo no compenſation is due. A ſimilar diſagreement ſubſiſts with reſpect to the caſe of a *Zimmee* deſtroying wine or pork belonging to a *Zimmee*; or of one *Zimmee* ſelling either of theſe articles to another; for ſuch ſale is lawful, according to our doctors,—in oppoſition to the opinion of *Shafeï*. The argument of *Shafeï* is that wine and pork are not articles of value with reſpect to *Muſſulmans*,—nor with reſpect to *Zimmees*, as thoſe are dependant of the *Muſſulmans* with regard to the precepts of the LAW. A compenſation of property, therefore, for the deſtruction of theſe articles, is not due. The arguments of our doctors are that wine and pork are valuable property with reſpect to *Zimmees*; for with them wine is the ſame as vinegar with the *Muſſulmans*, and pork the ſame as mutton; and we, who are *Muſſulmans*, being commanded to leave them in the practice of their religion, have conſequently no right to impoſe a rule upon them.—As, therefore, wine and pork are with them property of value, it follows that whoever deſtroys theſe articles belonging to them does, in fact, deſtroy their property of value: in oppoſition to the caſe of carrion or blood, becauſe theſe are not conſidered as property according to any religion, or with any ſect.—Hence it appears that if a *Muſſulman* deſtroy the wine or pork of a *Zimmee*, he muſt compenſate for the value of the pork,—and alſo of the wine, notwithſtanding that be of the claſs of ſimilars; becauſe it is not lawful for *Muſſulmans* to transfer the property of wine, as that would be to honour and reſpect it. It is otherwiſe where a *Zimmee* ſells wine to a *Zimmee*, or deſtroys the wine of a *Zimmee*; for in theſe caſes it is incumbent upon the ſeller to deliver over the wine to the purchaſer, and alſo upon the deſtroyer to give as a compenſation a ſimilar quantity of wine to the proprietor, ſince the transfer of the property of wine is not prohibited to *Zimmees*:—contrary to uſury, as that is excepted from the contracts of *Zimmees*;—or to the caſe of the ſlave of a *Zimmee*, who having been a *Muſſulman* becomes an apoſtate; for if any *Muſſulman* kill this ſlave, he is not in that caſe reſponſible to the *Zimmee*, notwithſtanding the *Zimmee* conſider the ſlave as valuable property, ſince we *Muſſulmans* are commanded to ſhew our abhorrence of apoſtates. It is alſo otherwiſe with reſpect to the wilful omiſſion of the *Taſmeeá*, or invocation, in the ſlaying of an animal, where the proprietor conſiders ſuch omiſſion as lawful, being, for inſtance, of the ſect of *Shafeï*;—in other words, if a perſon of the ſect of *Haneefa* deſtroy the fleſh of an animal ſo ſlain by a perſon of the ſect of *Shafeï*, the *Haneeſite* is not in that caſe reſponſible to the *Shafeyite*, notwithſtanding the latter did, according to his tenets, believe the ſlain animal to have been valuable property; becauſe the authority to convince the *Shafeyite* of the illegality of his practice is veſted in the *Haneeſite*, inaſmuch as it is permitted to him to eſtabliſh the illegality of it by reaſon and argument.

and muſt compenſate for it by a payment of the *value*.

A change wrought upon an uſurped article by any *un*expenſive proceſs does not alter the property; but if the proceſs be *expenſive*, the property devolves to the uſurper, who muſt make a compenſation.

If a perſon uſurp wine belonging to a *Muſſulman*, and convert it into vinegar by placing it alternately in the ſun and in the ſhade,—or the ſkin of a carrion, and tan or dreſs it by the application of ſome valuable article,—the proprietor of the wine is entitled to take the vinegar, without giving any thing to the uſurper, and the proprietor of the ſkin is entitled to take it, upon paying to the uſurper the increaſe it may have received from the dreſſing; for, in the former caſe, the converſion of the wine into vinegar is merely a *purification* of it, in the ſame manner as the bleaching of unclean cloth; and hence the property of the vinegar continues veſted in the proprietor, ſince a property is not created in the liquor by the operation of making it into vinegar; whereas, in the ſecond caſe, a valuable article belonging to the uſurper is united to the ſkin, in the ſame manner as a dye in cloth, and this caſe is therefore the ſame as the dying of a garment.—Accordingly, the proprietor of the wine is entitled to take the vinegar from the uſurper without making him any compenſation; and, on the other hand, the proprietor of the ſkin is entitled to take it from the uſurper, upon making a compenſation to him for the increaſe which it may have received from the dreſſing. The mode of aſcertaining the amount of this increaſe, is by firſt eſtimating the value of the ſkin ſuppoſing it undreſſed, and then the value which it bears dreſſed; when the difference muſt be paid to the uſurper. In this caſe, alſo, the uſurper is entitled to detain the article uſurped until he obtain his right, in the ſame manner as a ſeller is entitled to detain the goods ſold as a ſecurity for the price.—If, in the caſes here conſidered, the uſurper ſhould deſtroy the vinegar, or the dreſſed ſkin, he is reſponſible for the vinegar,—but not for the ſkin, according to *Haneefa*. The two diſciples maintain that he is reſponſible for the ſkin alſo,—being entitled, however, to the increaſe of value from the dreſſing. The reaſon of reſponſibility for the vinegar is, that as it ſtill continues in the property of the firſt proprietor, being, at the ſame time, an article of value, it follows that the uſurper is liable for the deſtruction of it; and as vinegar is of the claſs of ſimilars, he muſt compenſate for it by a ſimilar quantity.—With reſpect to the ſkin, the reaſons of reſponſibility for it (as maintained by the two diſciples) are twofold.—First, it ſtill continues the property of the proprietor, inaſmuch as he is entitled to take it back from the uſurper; and as it is an article of value, it follows that, in conſequence of the deſtruction of it by the uſurper, he [the proprietor] is entitled to take from him [the uſurper] a compenſation adequate to the value of the dreſſed ſkin; paying him afterwards the increaſe of value it has received from the dreſſing; in the ſame manner as where a perſon uſurps the cloth of another, and dyes it, and then deſtroys it,—in which caſe he is reſponſible for it to the proprietor, receiving from him, at the ſame time, the difference occaſioned in the value of the cloth by the dying.—Secondly, the reſtoration of the ſkin dreſſed was incumbent on the uſurper; whence, upon his deſtroying it, he is bound to give a conſideration for it, namely, the value;—in the ſame manner as where a borrower deſtroys the article borrowed; in which caſe he is reſponſible for the value.—It is to be obſerved, however, that if the deſtruction of the ſkin take place whilſt in the poſſeſſion of the uſurper, without his being the occaſion of it, in that caſe, according to all our doctors, he is not reſponſible for it, whether he have dreſſed it by the application of ſomething valuable, or otherwiſe. (With reſpect to what is advanced by the two diſciples, "that the proprietor muſt take "the value of the dreſſed ſkin from the uſurper, paying him after"wards the increaſe of value it has received from the dreſſing,"—it proceeds on the ſuppoſition that the value of the ſkin and of the operation of dreſſing is of different kinds,—as if the ſkin ſhould be valued in *deenars*, and the workmanſhip in *dirms*; for if both be eſtimated in the ſame ſpecies, the proprietor muſt at once deduct from the value of the ſkin the value of the workmanſhip, and take the difference from the uſurper; as it would be needleſs firſt to receive the whole from him, and then to pay back a part of it.)—The reaſoning of *Haneefa* is, that the ſkin in queſtion has been rendered valuable by the workmanſhip of the uſurper, namely, the dreſſing, which is of a valuable nature, as he mixed with it valuable property;—(whence his right to detain it until he receive the increaſe of value from the dreſſing.)—The workmanſhip, therefore, is his right; and the ſkin is, with reſpect to its being valuable, a dependant of the workmanſhip, that being the original;—and as the uſurper is not reſponſible for the original, namely, the workmanſhip, ſo neither is he reſponſible for the dependant, namely, the ſkin; in the ſame manner as he is not reſponſible where the ſkin is deſtroyed in his poſſeſſion without his act. It is otherwiſe where the ſkin is extant; for in ſuch caſe it is incumbent upon the uſurper to reſtore it to the proprietor, becauſe the reſtoration of it is a conſequent of the proprietor's right of property, and the ſkin is not a dependant of the operation of dreſſing it, with reſpect to right of property, ſince the property of the proprietor is eſtabliſhed in it prior to the dreſſing, although, whilſt in that condition, it was not an article of value:—in oppoſition to the caſe of cloth, or the ſkin of an animal killed according to the preſcribed forms; for the proprietor of theſe is entitled to a compenſation from the uſurper, as both are articles of value prior to the dreſſing or dying, and conſequently not dependant upon the workmanſhip with reſpect to their being valuable. It is to be obſerved that, in the caſe in queſtion, (that is, where the uſurper has dreſſed the ſkin with ſomething of value, and it remains extant in his poſſeſſion,) if the proprietor be inclined to leave it in the poſſeſſion of the uſurper, and take from him a compenſation for the value, ſome have ſaid that it is not permitted to him ſo to do, becauſe of the ſkin being of no value.—(It is otherwiſe in the caſe of dying cloth, the dye being an article of value.)—Some, again, have ſaid that this is not permitted to him according to *Haneefa*;—but that according to the two diſciples it is permitted to him; becauſe when the proprietor refuſes to take back the dreſſed ſkin, and, leaving it in the poſſeſſion of the uſurper, demands from him a compenſation, the uſurper has it not then in his power to reſtore it; and the caſe is, therefore, the ſame as if it had been deſtroyed, concerning which the two diſciples and *Haneefa* have diſagreed.—Some have ſaid that, according to the doctrine of the two diſciples, the proprietor is to take from the uſurper the value of the dreſſed ſkin, and return to him whatever increaſe it may have received from the dreſſing, in the ſame manner as in the caſe of a deſtruction; whilſt others have ſaid that the proprietor is entitled only to the value of an undreſſed ſkin of an animal killed according to the preſcribed form.—All that has been advanced on this topic proceeds on the ſuppoſition of the uſurper having dreſſed the ſkin with ſomething of value; for if he ſhould have dreſſed it with ſomething of *no* value, ſuch as by means of moiſture, or the heat of the ſun, the proprietor is then entitled to take it from him without making him any return, ſince a dreſſing of that nature is equivalent to the waſhing of cloths. If, alſo, in this caſe, the uſurper deſtroy the ſkin, he is reſponſible for the value of it in its dreſſed ſtate. Some, on the contrary, have ſaid that he is reſponſible for the value of it in its *un*dreſſed ſtate, becauſe the dreſſing, as being an acquiſition of his own, ought not to ſubject him to reſponſibility. The firſt opinion is adopted by moſt of the modern lawyers; and the reaſon of it is, that the quality of dreſſing, as being a dependant of the ſkin, cannot be ſeparated from it; and conſequently, when reſponſibility takes place with reſpect to the original [the ſkin] it muſt alſo operate with reſpect to the dependant, namely, the quality [of dreſſing.]

Caſe of converting uſurped wine into vinegar, by means of mixing in it ſome valuable ingredient.

If an uſurper of wine convert it into vinegar by throwing ſalt into it, lawyers have ſaid that, according to *Haneefa*, the vinegar becomes the property of the uſurper without any thing being due from him; whereas, according to the two diſciples, the proprietor is entitled to take the vinegar, making a compenſation to the uſurper for the increaſe of the article by means of the ſalt;—(that is to ſay, he muſt give him a quantity of vinegar equal to the weight of the ſalt.) If, on the contrary, the proprietor wiſh to leave the vinegar with the uſurper, and take a compenſation from him for its value, the ſame two opinions that have been given with regard to the caſe above recited of the dreſſing of a ſkin, prevail with regard to this caſe. If, alſo, the uſurper deſtroy the wine, he is no ways reſponſible, according to *Haneefa*,—in oppoſition to the opinion of the two diſciples, as has been already recited in the caſe of dreſſing a ſkin.—If the uſurper convert the wine into vinegar by means of pouring vinegar into it, in that caſe it is related as an opinion of *Mohammed* that, provided the wine be turned into vinegar within the hour in which the uſurper poured the vinegar into it, it is his property, without his being ſubject to any compenſation; becauſe the pouring of the vinegar, in ſuch caſe, is equivalent to a deſtruction of the wine; and wine is not an article of value. If, on the other hand, the wine, becauſe of the quantity of vinegar poured into it being ſmall, ſhould not become vinegar until after the lapſe of a conſiderable period, it muſt in that caſe be divided between the uſurper and the proprietor, according to its meaſure; that is, the uſurper is entitled to a part of it in proportion to the quantity poured in, and the proprietor to a part of it in proportion to the quantity of wine; becauſe in this caſe the uſurper has mixed his vinegar with what eventually became the vinegar of the proprietor; and this (in the opinion of *Mohammed*) is not a deſtruction. In the opinion of *Haneefa*, however, the vinegar, in both caſes, becomes the property of the uſurper; becauſe the immediate act of his pouring vinegar into the wine is (according to him) a deſtruction of it; and this deſtruction does not, on any ſuppoſition, occaſion reſponſibility, becauſe if conſidered as a deſtruction of *wine*, it is a deſtruction of a thing that bears no value, or if conſidered as the deſtruction of vinegar, it is a deſtruction of his own property, inaſmuch as the vinegar becomes the property of the uſurper. According to *Mohammed* the uſurper is not reſponſible where he deſtroys the liquor after its having become vinegar on the hour in which he put the other vinegar into it; for as, in this caſe, he acquires a right in the whole, he of courſe merely deſtroys his own property; whereas if he deſtroy it where it has become vinegar after a length of time, he is reſponſible, ſince in this caſe he deſtroys the property of another. With reſpect to what has been recited in *Kadooree*, ſome of our modern lawyers have ſaid that

Digitized by Google

that it is abſolute; that is, that in all converſions of uſurped wine into vinegar, the proprietor is entitled to take it without making any compenſation to the uſurper; becauſe the thing thrown into the wine by the uſurper is of no value, inaſmuch as, by the mixture of it with wine, it becomes virtually *wine*, which is a thing of no value. There are a variety of opinions concerning this caſe, which the author of this work has recited in the *Kafàyat al Moontihee*.

A perſon is reſponſible for deſtroying the muſical inſtruments, &c. or the prepared drink of a *Muſſulman*,

If a perſon break the lute, the tabor, the pipe, or the cymbal of a *Muſſulman*, or ſpill his *Sikker* *, or *Moniſſaf* †, he is reſponſible, the ſale of ſuch articles being lawful, according to *Haneefa*. The two diſciples maintain that he is not reſponſible, they holding ſuch articles to be unſaleable. Some ſay that this difference of opinion obtains only concerning ſuch muſical inſtruments as are merely uſed for amuſement; but that if a perſon break a drum, ſuch as is uſed in war, or a tabor or cymbal, ſuch as are allowed to be uſed in celebrating a marriage, he is reſponſible, according to all our doctors. Some, alſo, ſay that, in decreeing reſponſibility, opinions are given according to the doctrine of the two diſciples. By *Sikker* is underſtood the juice of unripe dates, which is ſuffered to ferment and acquire a ſpirit without boiling; and by *Moniſſaf*, the juice of unripe grapes, boiled until only one half remain. Concerning liquor boiled in the ſmalleſt degree, which is termed *Bàzik* ‡, there are two opinions reported from *Haneefa*,—one, that it is a lawful ſubject both of ſale and reſponſibility,—and another, that it is not ſo. The arguments of the two diſciples on this point are,—FIRST, that theſe articles are all made for the purpoſe of doing that which is offenſive to the LAW, and therefore are not valuable property.—SECONDLY, what the perſon in queſtion has done was in reformation of an abuſe; and as we are directed to reform abuſes wherever they occur, he therefore is not reſponſible, in the ſame manner as he would not be reſponſible if he were to deſtroy thoſe articles by order of the magiſtrate. The argument of *Haneefa* is that the articles in queſtion are property, as being capable of yielding a lawful advantage, although they be alſo capable of being uſed unlawfully, and therefore reſemble a female ſinger,—whence there is no reaſon why they ſhould not be conſidered as valuable property. As, therefore, thoſe articles are (according to *Haneefa*) of a valuable nature, a reparation is due from the deſtroyer of them; and if a perſon were to ſell them, the ſale is lawful; for the obligation of reparation, and the legality of ſale, depend upon an article being property, and capable of valuation, circumſtances which exiſt with reſpect to the articles in queſtion. The reformation of abuſes, moreover, is committed to the hands of magiſtrates, as they are enabled, by the nature of their office, to carry it into effect; but it is not entruſted to others, excepting merely to the extent of verbal inſtruction and advice. Proceeding upon the doctrine of *Haneefa*, the deſtroyer, in the caſe here conſidered, is reſponſible for the value the articles bear in themſelves, independant of the particular amuſement to which they contribute. Thus if a female ſinger (for inſtance) be deſtroyed, ſhe muſt be valued merely as a ſlave girl; and the ſame of fighting rams, tumbling pigeons, game cocks, or eunuch ſlaves; in other words, if any of theſe be deſtroyed, they muſt be valued and accounted for at the rate they would have borne if unfit for the light and evil purpoſes to which ſuch articles are commonly applied; and ſo likewiſe of pipes, tabors, and other muſical inſtruments. It is to be obſerved that, in the caſe of ſpilling *Sikker* or *Moniſſaf*, the deſtroyer is reſponſible for the *value* of the article, and not for a ſimilar, becauſe it does not become a *Muſſulman* to be proprietor of ſuch articles. If, on the contrary, a perſon deſtroy a crucifix belonging to a *Chriſtian*, he is reſponſible for the value it bears *as a crucifix*; becauſe *Chriſtians* are left to the practice of their own religious worſhip.

---

* A ſort of intoxicating liquor.

† Half boiled wine. (Theſe terms are fully explained in Book XLVI. treating of *Prohibited Liquors.*)

‡ A ſpecies of date wine.

and muſt compenſate for them by paying their intrinſic value.

If

The uſurper of a *Modabbirá* is reſponſible for her value if ſhe die in his poſſeſſion; but not the uſurper of a *Mokátibá*.

If a perſon uſurp the *Modabbirá* of another, and ſhe die in his poſſeſſion, he is reſponſible for her value; whereas, if a perſon uſurp the *Am-Walid* of another, and ſhe die in his poſſeſſion, he is not reſponſible. This is according to *Haneefa*. The two diſciples maintain that the uſurper is reſponſible for the value in either inſtance.—The reaſon of this difference of opinion is, that a *Modabbirá* is univerſally admitted to be valuable property; and an *Am-Walid* is not valuable, according to *Haneefa*; whereas the two diſciples hold an *Am-Walid* to be valuable. The arguments on both ſides have been already detailed at length in treating of *Manumiſſion*.

Digitized by Google

HEDAYA.

BOOK XXXVIII.

Of SHAFFA.

Definition of *Shaffa*.

SHAFFA, in the language of the LAW, ſignifies the becoming proprietor of lands ſold for the price at which the purchaſer has bought them, although he be not conſenting thereunto. This is termed *Shaffa*, becauſe the root from which *Shaffa* is derived ſignifies *conjunction*, and the lands ſold are here *conjoined* to the land of the *Shafee*, or perſon claiming the right of pre-emption.

Chap. I. Of the Perſons to whom the Right of *Shaffa* appertains.
Chap. II. Of Claims to *Shaffa*; and of Litigation concerning it.
Chap. III. Of the Articles concerning which *Shaffa* operates.
Chap. IV. Of Circumſtances which invalidate the Right of *Shaffa*.

CHAP. I.

Of the Perſons to whom the Right of SHAFFA *appertains.*

The right of *Shaffa* appertains to a partner in the *property*, a participator in the *immunities* of the property, and a *neighbour*.

THE right of *Shaffa* appertains,—I. to a partner in the *property* of the land ſold,—II. to a partner in the *immunities* and *appendages* of the land, (ſuch as the right to *water*, and to *roads*;)—and III. to a *neighbour*.—The right of *Shaffa* in a partner is founded on a precept of the prophet, who has ſaid, "*The right of* SHAFFA *holds in a partner* "*who has not divided off and taken ſeparately his ſhare.*"—The eſtabliſhment of it in a *neighbour* is alſo founded on a ſaying of the prophet, "*The neighbour of a houſe has a ſuperior right to that houſe;* "*and the neighbour of lands has a ſuperior right to thoſe lands; and if* "*he be abſent, the ſeller muſt wait his return; provided, however, that* "*they both participate in the ſame road;*"—and alſo, "*A neighbour* "*has a right, ſuperior to that of a ſtranger, in the lands adjacent to* "*his own.*"—*Shafeï* is of opinion that a neighbour is not a *Shafee** ;

---

* In other words, "*is not entitled to the right of* SHAFFA;"—*Shafee* being the term uſed to expreſs the perſon endowed with that right.

becauſe the prophet has ſaid, "SHAFFA *relates to a thing held in joint "property, and which has not been divided off:*" when, therefore, the property has undergone a diviſion, and the boundary of each partner is particularly diſcriminated, and a ſeparate road aſſigned to each, the right of *Shaffa* can no longer exiſt. Beſides, the exiſtence of the right of *Shaffa* is repugnant to analogy, as it involves the taking poſſeſſion of another's property contrary to his inclination; whence it muſt be confined ſolely to thoſe to whom it is particularly granted by the LAW. Now, it is granted particularly to a *partner*; but a *neighbour* cannot be conſidered as ſuch; for the intention of the LAW, in granting it to a partner, is merely to prevent the inconveniences ariſing from a diviſion; ſince if the partner were not to get that ſhare which is the ſubject of the claim of *Shaffa*, a new purchaſer might inſiſt upon a diviſion, and thereby occaſion to him a great deal of unneceſſary vexation;—but as this argument does not hold good in behalf of a neighbour, he therefore is not entitled to the privilege of *Shaffa*.—We*, on the contrary, allege that the precept of the prophet, already quoted, is a ſufficient ground for eſtabliſhing the right of *Shaffa* in a neighbour.—Beſides, the reaſon for eſtabliſhing this right in a *partner* is, the circumſtance of his property being continually and inſeparably adjoined to that of a ſtranger†, (namely, the purchaſer,) which is injurious to him, becauſe of the difference of a ſtranger's diſpoſition, and ſo forth; and certainly a greater regard is due to the partner than to the ſtranger who may have made the purchaſe, ſince the vexation that would enſue to the partner from forcing him to abandon a place which, from long reſidence, may have acquired his affections, would doubtleſs be greater than that to which the ſtranger is ſubjected; for, although he may thus be diſpoſſeſſed, contrary to his inclination, of a property over which he has acquired a right by purchaſe, yet ſtill the grievance is but inconſiderable, ſince he is not diſpoſſeſſed without receiving a due conſideration;—and as all theſe reaſons equally hold in behalf of a *neighbour*, he is therefore entitled to the privilege of *Shaffa* as well as a *partner*.—The reaſons, moreover, on which *Shafei* grounds the right of a partner, and the diſtinction he makes betwixt a partner and a neighbour, can by no means be admitted; ſince the inconveniences attending a diviſion of property are allowed by the LAW; and are not of ſuch a nature that the preventing of them ſhould juſtify the injury which muſt be committed in depriving another of his property contrary to his inclinations.—The order in which we have claſſed the perſons entitled to the privilege of *Shaffa* is founded on a precept of the prophet, who has ſaid, "*A partner in the thing itſelf* "*has a ſuperior right to one who is only a partner in its appendages;* "*and a partner in the appendages of the property precedes a neighbour.*" Beſides, the conjunction occaſioned by a partnerſhip in the property itſelf is of all others the ſtrongeſt; and next to it is that occaſioned by a partnerſhip in the appendages, (ſince here the party participates in the *immunities* of the property, which is not the caſe with a *neighbour*;) and a ſuperiority of right, in every inſtance, depends on the ſtrength of the cauſe, or fundamental principle. The vexations, moreover, and inconvenience ariſing from a diviſion may be admitted as an *additional* argument, although it be not of ſuch weight as to form a ground for injury to another.

---

* Meaning, the *Haneefites*, (in oppoſition to the followers of *Shafei*.)

† Arab. *Dakheel*; meaning, literally, "an *arriver*;" i. e. a *new comer*.

No perſon can claim it during the exiſtence of one who has a *ſuperior* right,

A PARTNER merely in the road or the rivulet, or a neighbour, cannot be entitled to the privilege of *Shaffa* during the exiſtence of one who is a partner in the property of the land; for his is the ſuperior right, as has been already ſhewn.

unleſs he firſt relinquiſh it, when the title devolves to the next in ſucceſſion.

IF a partner in the property of the land relinquiſh his right of *Shaffa*, it devolves next to him who is a partner in the road; and if he alſo relinquiſh his right, it falls to the *Jár Moláſick*, or perſon whoſe houſe is ſituated at the back of that which is the object of *Shaffa*, having the entry to it by another road. *Aboo Yooſaf* is of

opinion,

opinion, that during the exiſtence of a partner in the ground, whether he reſign or inſiſt upon his right, no other perſon is entitled to the privilege of *Shaffa*; for by his exiſtence all others are excluded; and whilſt the excluder remains the excluded have no right; as holds in inheritance.—The ground on which the *Zâhir Rawâyet* (firſt quoted as above) proceeds is, that the *cauſe* of the privilege of *Shaffa* exiſts with reſpect to each of the above-mentioned perſons. The partner, however, has the ſuperior right. Upon his relinquiſhing it, therefore, the one who is next to him in order of precedence will aſſume it;—in the ſame manner as holds with reſpect to debts contracted during health, when they came in competition with debts contracted in ſickneſs; that is, the former are firſt diſcharged; but if the creditor whoſe debt was contracted in health relinquiſh his claim, the eſtate of the deceaſed is then appropriated to diſcharge the claim of him whoſe debt was contracted under ſickneſs.

A perſon who is a joint proprietor of only a *part* of the article has a title ſuperior to a *neighbour*.

A perſon who is a joint proprietor of only a *part* of the property ſold, (ſuch as a partner in a particular *room* or *wall* of a houſe,) as he has a right ſuperior to one who is neighbour to that particular part, ſo likewiſe has he a right ſuperior to one who is a neighbour to the reſt of the houſe. This is an approved maxim of *Aboo Yooſaf*; for the conjunction holds ſtronger in the caſe of a perſon who is a joint proprietor of only a *part* of the houſe, than in that of one who is merely a neighbour. It is neceſſary that the road or rivulet, the joint participation in which gives a claim to the privilege of *Shaffa*, be *private*. By a *private* road is underſtood a road ſhut up at one end; and by a *private* rivulet we underſtand a ſtream of water in which boats cannot paſs and repaſs; for otherwiſe it is a public river. (This is according to *Haneefa* and *Mohammed*. It is reported from *Aboo Yooſaf*, that a *private* rivulet is a ſtream which affords water to two or three pieces of ground; but if it exceed that, it is a *public* one.)

In

The relative ſituation of the property determines the right, when claimed on the plea of *neighbourhood.*

If a houſe be ſold, ſituated in a ſhort lane, ſhut up at one end, communicating through another lane, ſhut up alſo at one end, but of greater extent, in this caſe the inhabitants of the *ſhort* lane only are entitled to the privilege of *Shaffa*; whereas, if a houſe ſituated in the *long* lane be ſold, the inhabitants of *both* lanes are ſo entitled. The reaſon of this is, that the right of egreſs and regreſs in the ſhort lane is participated only by its own inhabitants, whereas the right in the *long* lane appertains equally to the inhabitants of *both*;—as has been already explained under the head of "*Duties of the* KÂZEE." The ſame rule alſo holds good in the caſe of a ſmall rivulet iſſuing out of another.

The laying of beams on the wall of a houſe gives a right of *Shaffa* from *neighbourhood*, but not from *partnerſhip*, ſince this act does not conſtitute a partnerſhip in the *property* of the houſe. In the ſame manner, alſo, a perſon who is a partner in a beam laid on the top of the wall is only held in the light of a neighbour.

The right of all the *Shafees* (claiming upon equal ground) is equal, without any regard to the extent of their properties.

When there is a plurality of perſons entitled to the privilege of *Shaffa*, the right of all is equal, and no regard is paid to the extent of their ſeveral properties. *Shafeï* maintains that the right of *Shaffa* in this caſe is poſſeſſed by the parties in proportion to their ſeveral properties; becauſe *Shaffa* is one of the immunities of their property, and muſt therefore be held, like the profits of trade, the produce of lands, the offspring of ſlaves, or the fruit of trees, in proportion to their reſpective ſhares in the joint property. The argument of our doctors is, that the parties being all equal with reſpect to the principle on which their right of *Shaffa* is grounded, (namely, a conjunction with the lands ſold,) they are all conſequently equal in the right itſelf,—whence if only *one* partner were preſent, however inconſiderable his ſhare might be, he would be entitled to the whole of the *Shaffa*.—In reply, moreover, to the arguments uſed by *Shafeï*, it is to be obſerved that

Digitized by Google

that the diſſeizing another of his property, contrary to his inclination, is not one of the immunities of property, and is very different from the profits of trade, the fruits of trees, or the like, which are produced abſolutely from the property itſelf.

If one of the parties relinquiſh his right, it devolves to the others, and is participated equally amongſt them; for although the grounds of their right were complete, yet they were obſtructed from enjoying the entire privilege by the intervention of his right; but that right being reſigned, the obſtruction conſequently no longer remains.

If ſome be abſent, the *Shaffa* is adjudged equally amongſt thoſe who are preſent;—but the abſentees appearing receive their ſhares.

If ſome of the partners happen to be abſent, the whole of the *Shaffa* is to be decreed equally amongſt thoſe who are preſent; for it is a matter of uncertainty whether thoſe who are abſent would be inclined to demand their right; and the rights of thoſe who are preſent muſt not be prejudiced on a mere uncertainty.—If, however, the *Kâzee* ſhould have decreed the whole of the *Shaffa* to one who is preſent, and an abſentee afterwards appear and claim his right, the *Kâzee* muſt decree him the half; and ſo likewiſe if a third appear, he muſt decree him one third of the ſhares reſpectively held by the other two; in order that thus an equality may be eſtabliſhed amongſt them.

If the perſon preſent ſhould relinquiſh his *Shaffa* after the whole has been decreed to him by the *Kâzee*, and the abſentee afterwards appear, he is in this caſe entitled to claim only one half; becauſe the decree which the *Kâzee* has paſſed, awarding the whole to the other, abſolutely extinguiſhed one half of the abſentee's right.—It were otherwiſe if the perſon preſent relinquiſh his right previous to any decree being paſſed by the *Kâzee*, and afterwards the abſentee appear; for in this caſe he [the abſentee] is entitled to the whole of the *Shaffa*.

The right does not operate until after the ſale of the property;

The privilege of *Shaffa* is eſtabliſhed after the ſale; for it cannot take place until it be manifeſt that the proprietor is no longer inclined to keep his houſe; and this is manifeſted by the ſale of it. It is therefore ſufficient, in order to prove the ſale and eſtabliſh the privilege of *Shaffa*, that the ſeller acknowledge the ſale, although the perſon ſaid to be the buyer deny it.

nor until it be regularly demanded:

The right of *Shaffa* is not eſtabliſhed until the demand be regularly made in the preſence of witneſſes;—and it is requiſite that it be made as ſoon as poſſible after the ſale is known; for the right of *Shaffa* is but a feeble right, as it is the diſſeizing another of his property merely in order to prevent apprehended inconveniences.—It is therefore requiſite that the *Shafee* without delay diſcover his intentions, by making the demand; which muſt be done in the preſence of witneſſes, otherwiſe it cannot be afterwards proved before the *Kâzee*,

neither does the property go to the *Shafee* but by the ſurrender of the purchaſer, or a decree of the magiſtrate.

When the demand has been regularly made in the preſence of witneſſes, ſtill the *Shafee* does not become proprietor of the houſe until the purchaſer ſurrender it to him, or until the magiſtrate paſs a decree; becauſe the purchaſer's property was complete, and cannot be transferred to the *Shafee* but by his own conſent, or by a decree of a magiſtrate; in the ſame manner as in the caſe of a retraction of a grant, where the property of the grantee being completely eſtabliſhed by the grant, it cannot be transferred to the granter, but by the ſurrender of the grantee, or by a decree of a magiſtrate. The uſe of this law appears in a caſe where the *Shafee*, after having preferred his claim before witneſſes previous to the decree of the magiſtrate or the ſurrender of the purchaſer, dies, or ſells the houſe from whence he derived his right;—or where the houſe adjoining to that to which the right of *Shaffa* relates is ſold; for in the firſt of theſe inſtances the houſe is not a part of his hereditaments, becauſe it was not his property; and the right of *Shaffa* fails in the ſecond inſtance, as the fundamental

Digitized by Google

fundamental principle of that right is extinguiſhed previous to his becoming the proprietor; and in the third caſe, he has no right of *Shaffa* with reſpect to the houſe which is ſold, ſince the houſe from which he would have derived that right is not his property.

CHAP. II.

Of Claims to *Shaffa*, and of Litigation concerning it.

CLAIMS to *Shaffa* are of three kinds.—The firſt of theſe is termed *Talb Mawâſibat*, or *immediate* claim, where the *Shafee* prefers his claim the moment he is apprized of the ſale being concluded; and this it is neceſſary that he ſhould do, inſomuch that if he make any delay his right is thereby invalidated; for the right of *Shaffa* is but of a *feeble* nature, as has been already obſerved; and the prophet, moreover has ſaid, "*The right of* SHAFFA *is eſtabliſhed in him who prefers* "*his claim without delay.*"

The claims are of three kinds. I. The *immediate* claim, (which muſt be made on the inſtant, or the *Shafee* forfeits his title;)

IF the *Shafee* receive a letter which, either in the beginning or the middle, apprizes him of the circumſtance of his *Shaffa*, and he read it on to the end, his right of *Shaffa* is thereby invalidated. Many of our modern doctors accord in this opinion; and it is in one place recorded as the doctrine of *Mohammed.*—In another place, however, it is reported from him, that if the man claim his *Shaffa* in the preſence of the company amongſt whom he may be ſitting when he receives the intelligence, he is the *Shafee*, his right not being invalidated unleſs he delay aſſerting it till after the company have broke up. Both theſe opinions are mentioned in the *Nawâdir*;—and *Koorokhee* paſſed degrees agreeably to the laſt quoted report; becauſe the power of accepting or rejecting the *Shaffa* being eſtabliſhed, a ſhort time ſhould neceſſarily be allowed for reflection; in the ſame manner as time is allowed to a woman to whom her huſband has given the power of chuſing to be divorced or not.

If the *Shafee*, on hearing of the ſale, exclaim "*Praiſe be to* "God!" or "*There is no power or ſtrength but what is derived from* "God!" or "God *is pure!*" his right of *Shaffa* is not invalidated, inſomuch that if, immediately on pronouncing theſe words, he without delay claim his *Shaffa*, he will accordingly get it; becauſe the firſt of theſe is conſidered as a thankſgiving on his being freed of the neighbourhood of the ſeller; the ſecond (which is an expreſſion of admiration) is ſuppoſed to proceed from the aſtoniſhment with which he is ſtruck at the intention manifeſted by the ſeller of doing a thing which would be vexatious to him; and the laſt is conſidered as an exclamation prefatory to further diſcourſe. None of theſe expreſſions, therefore, can imply a refuſal or rejection of the *Shaffa*.—In the ſame manner alſo, if, on receiving the news of the ſale, he aſk "Who is "the purchaſer, and how much is the price?" it does not invalidate his right; ſince theſe queſtions cannot be conſidered as a refuſal, but on the contrary it may be concluded from them that if the price be reaſonable, and the purchaſer a perſon whom he would not like as a neighbour, he will afterwards claim his right of *Shaffa*.

It is not material in what words the claim is preferred; it being ſufficient that they imply *a claim*. Thus if a perſon ſay "I *have* "*claimed* my *Shaffa*," or "I *ſhall* claim my *Shaffa*," or "I *do* claim "my *Shaffa*," all theſe are good; for it is the *meaning*, and not the *ſtyle* or *mode of expreſſion*, which is here conſidered.

WHEN news of the ſale is brought to the *Shafee*, it is not neceſſary, according to *Haneefa*, that he aſſert his intention of claiming the *Shaffa* before witneſſes, unleſs the news be communicated to him by two men, or one man and two women, or one upright man. The two diſciples maintain that he ought to declare his intentions before witneſſes as ſoon as the news is communicated to him by one perſon, being either a freeman or a ſlave, a woman or a child,—provided, however, that the perſon be, in his belief, a true ſpeaker.—It is otherwiſe where a woman is informed that her huſband has given her the power of divorcing herſelf; for in that caſe it does not ſignify who is the informer, or what is his character.

IF the perſon who gives the intelligence to the *Shafee* be himſelf the buyer, it is not (according to *Haneefa*) in ſuch caſe neceſſary that he be an upright man; becauſe he is the opponent; and uprightneſs is not requiſite in him.

II. The claim *by affirmation and taking to witneſs*, (which muſt be made as ſoon as conveniently may be after the other;)

THE ſecond mode of claim to *Shaffa* is termed the *Talb Takreer wa Iſh-hàd*, or claim by affirmation and taking to witneſs;—and this alſo is requiſite; becauſe evidence is wanted in order to eſtabliſh proof before the magiſtrate; and it is probable that the claimant cannot have witneſſes to the *Talb Mawàſibat*, as that is expreſſed immediately on intimation being received of the ſale. It is therefore neceſſary afterwards to make the *Talb Iſh-hàd wa Takreer*, which is done by the *Shafee* taking ſome perſon to witneſs,—either againſt the ſeller, if the ground ſold be ſtill in his poſſeſſion,—or againſt the purchaſer,—or upon the ſpot regarding which the diſpute has ariſen; and upon the *Shafee* thus taking ſome perſon to witneſs, his right of *Shaffa* is fully eſtabliſhed and confirmed. The reaſon of this is, that both the buyer and ſeller are opponents to the *Shafee* in regard to his claim of *Shaffa*; the one being the poſſeſſor, and the other the proprietor of the ground;—and the taking evidence on the ground itſelf is alſo valid; becauſe it is that to which the right relates. If the ſeller have de-

Digitized by Google

livered over the ground to the buyer, the taking evidence againſt him is not ſufficient, he being no longer an opponent; for having neither the poſſeſſion nor the property, he is as a ſtranger. The manner of claim by affirmation and taking to witneſs is, the claimant ſaying "Such a perſon has bought ſuch a houſe, of which I am the *Shafee*; "I have already claimed my privilege of *Shaffa*, and now again claim "it: be therefore witneſs thereof." (It is reported from *Aboo Yooſaf* that it is requiſite the *name* of the thing ſold, and its particular boundaries, be ſpecified; becauſe a claim is not valid unleſs the thing demanded be preciſely known.)

and III. Claim by *litigation.*

The third mode of claim to *Shaffa* is termed *Talb Khaſoomat*, or claim by litigation,—which is performed by the *Shafee* petitioning the *Kâzee* to command the purchaſer to ſurrender up the ground to him; the method of doing which will hereafter be particularly explained.

A delay in the litigation does not invalidate the claim;

If the *Shafee* delay making claim by litigation, ſtill his right does not drop, according to *Haneefa*. Such alſo is the generally received opinion; and decrees paſs accordingly. There is likewiſe one opinion recorded from *Aboo Yooſaf* to the ſame effect. *Mohammed* maintains that if the *Shafee* poſtpone the litigation for one month after the taking of evidence, his right drops. This is alſo the opinion of *Ziffer*; and it is related as an opinion of *Aboo Yooſaf*, that the right of the *Shafee* becomes null if he delay the litigation after the *Kâzee* has held one court; for, if he willingly, and without alleging any excuſe, omit to commence the litigation at the firſt court held by the *Kâzee*, it is a preſumptive proof of his having declined it. The reaſoning on which *Mohammed* founds his opinion in this particular is, that if the right of the *Shafee* was never to be invalidated by his delaying the litigation, it would be very vexatious to the buyer; for he would be prevented from enjoying his property, in the apprehenſion of being deprived of it by the claim of the *Shafee*.—"I have therefore (ſays *Mohammed*)

" limited the delay that may be admitted to *one month*, as being the " longeſt allowed term of procraſtination."—In ſupport of the opinion of *Haneefa*, it is urged that the right of the *Shafee* being firmly eſtabliſhed by the taking of evidence, it cannot be extinguiſhed but by his own rejection, openly declared;—in the ſame manner as holds in all other matters of right.—With reſpect to what is mentioned by *Mohammed*, that " the delay would be vexatious to the buyer," it is of no weight; for in caſe of the abſence of the *Shafee*, his right is not invalidated by the litigation being delayed; and the vexation ſuſtained by the buyer from the delay is equally the ſame, whether the *Shafee* be preſent or abſent.

particularly, if it be occaſioned by the abſence of the magiſtrate.

IF it appear that the *Kâzee* was not in the city, and that on *that* account the litigation was delayed, the right is not invalidated, according to the concurrent opinion of the three above-mentioned ſages; for the litigation can only be made in the preſence of the *Kâzee*; and the delay is therefore excuſed.

Rules to be obſerved by the magiſtrate on an appeal;

WHEN the *Shafee* goes to the *Kâzee* and claims his right, alledging that " ſuch a perſon has purchaſed a houſe, in which he has the " right of *Shaffa*," the *Kâzee* muſt firſt queſtion the purchaſer (the defendant in the cauſe) concerning the property on which the *Shafee* grounds his right of *Shaffa*; and if he acknowledge it, this is a ſufficient ground for the *Kâzee* paſſing a decree:—but if he deny it, the *Kâzee* muſt then order the *Shafee* to bring witneſſes to prove his property; for the poſſeſſion, which is apparent, may be owing to other cauſes than property; and a thing which is thus doubtful cannot be admitted as a proof to the detriment of another. *Kadooree* alleges, that the *Kâzee*, before he applies to the defendant, ought to aſk the plaintiff regarding the ſituation of the houſe and its boundaries; becauſe if a man ſue for the property of a houſe, it is requiſite that he deſcribe its ſituation and boundaries; and therefore he muſt do the ſame in claiming his right of *Shaffa*. When he has done this, the *Kâzee* muſt

Digitized by Google

muſt next interrogate him regarding the grounds of his right of *Shaffa*; for the grounds of *Shaffa* are various, and poſſibly he may ſet forth grounds according to his own imagination, which do not, in reality, conſtitute any ground. If he reply that "he is the *Shafee*, becauſe "of his houſe being ſituated next to that which is the preſent object "of diſpute," his claim (as *Khaſâf* obſerves) is complete. It is alſo mentioned in the *Fâtàvee*, that he muſt deſcribe the boundaries of the houſe from whence he derives his right to the *Shaffa* in queſtion.

and the mode preſcribed for his examining the parties.

If the *Shafee*, being unable to bring witneſſes, require that the purchaſer be put to his oath, it muſt be tendered merely according to the beſt of his [the purchaſer's] knowledge; (that is, he muſt be required to ſay, "By God, I know not that the plaintiff is the proprietor of the houſe on which he founds his claim of *Shaffa*;") becauſe his depoſition relates to a thing which is in the hands of another, and therefore he can only ſwear as to his own knowledge, and not poſitively as to the fact in queſtion, namely, whether the houſe be, *for certain*, the property of the plaintiff or not.—If the purchaſer refuſe to ſwear, or the *Shafee* bring evidence, his property is proved in that houſe from which he derives his claim of *Shaffa*, and the neighbourhood of that houſe to the one in diſpute is alſo proved. The *Kâzee* muſt next aſk the purchaſer whether he has bought the houſe or not? and if he deny it, the *Kâzee* muſt order the *Shafee* to bring witneſſes to prove the purchaſe; for the *Shaffa* cannot be eſtabliſhed until the ſale be proved; which muſt be done by witneſſes.—If the *Shafee* cannot bring witneſſes, the *Kâzee* muſt adminiſter an oath to the purchaſer to this effect, that "he has not purchaſed the houſe," or that "the plaintiff is not entitled to the privilege of *Shaffa* in the "manner in which he has claimed it;" for here he ſwears regarding an act committed by himſelf, and relative to a thing which is in his own poſſeſſion; and therefore it is neceſſary that the oath be poſitive as to the certainty of the fact.

The *Shafee* may litigate his claim of *Shaffa* although he do not produce in court the price of the ground in diſpute:—but when the *Kázee* has decreed to him the privilege of *Shaffa*, it is neceſſary that he bring the price. This is the doctrine of the *Záhir Rawáyet*, as quoted in the *Mabſoot*. It is reported, from *Mohammed*, that the *Kázee* ought not to paſs the decree until the *Shafee* produce the price; (and the ſame is alſo cited by *Haſan* from *Haneefa*;) becauſe poſſibly the *Shafee* may be indigent, and the *Kázee* muſt therefore delay the decree, in order that the purchaſer may not loſe his property.—The reaſon aſſigned in ſupport of the firſt opinion quoted from the *Záhir Rawáyet*, is that the price does not become due from the *Shafee* to the purchaſer until the *Kázee* have paſſed his decree; and as the purchaſer is not obliged to ſurrender up the ground previous to the decree, ſo in the ſame manner the *Shafee* (as has been mentioned above) is under no neceſſity of previouſly producing the price:—nor can there be any apprehenſion of the purchaſer loſing his property, ſince he has the right of detention, as will more particularly be ſhewn in the enſuing examples.

The cauſe may be litigated and determined independant of the *price* of the property in diſpute:

When, previous to the *Shafee* producing the price, the *Kázee* has commanded the purchaſer to deliver up the ground [to the *Shafee*,] ſtill he may retain it in his own hand until the price be brought to him.

but the defendant may retain the one until the other be produced.

If the *Shafee* delay to pay the price to the purchaſer, after the *Kázee* has ordered him, ſtill his privilege of *Shaffa* is not invalidated; for it has become firmly eſtabliſhed by the litigation and the decree of the *Kázee*.

The privilege is not forfeited by a delay in the payment.

If the *Shafee* bring the ſeller into court whilſt the houſe is ſtill in his poſſeſſion, he [the *Shafee*] may commence his litigation againſt him, and the ſeller may retain the houſe in his own poſſeſſion until he receive the price from the *Shafee*. The *Kázee*, however, is not

The ſeller may be ſued whilſt the houſe is in his poſſeſſion.

Digitized by Google

in this caſe to hear the evidence until the purchaſer alſo appear, as for his preſence there is a twofold reaſon; for FIRST, the purchaſer is proprietor of the ground, and the ſeller the poſſeſſor; and as the decree of the *Kázee* muſt be againſt both, both therefore muſt be preſent. (It is otherwiſe where the purchaſer has obtained poſſeſſion; for then there can be no occaſion for the preſence of the ſeller, as he has become like a ſtranger, having neither the property nor the poſſeſſion.) SECONDLY, the ſale or bargain which had been concluded in favour of the purchaſer is to be diſſolved by *decree*; and it is therefore requiſite that he be preſent, in order that the *Kázee* may decree the diſſolution againſt him.

An *agent* for the purchaſer may be ſued (before delivery to his conſtituent,)

IF an agent on behalf of another purchaſe ground, the *Shafee* muſt ſue the agent. If, however, the agent have delivered over the ground to his conſtituent, the *Shafee* muſt not inſtitute his ſuit againſt the agent, (as he is neither the proprietor nor the poſſeſſor,) but againſt his conſtituent; for the agent then ſtands as the ſeller, and his conſtituent as the purchaſer; and when (as has been already explained) the ſeller delivers up the ground to the purchaſer, the *Shafee*'s ſuit is againſt the latter.

and ſo alſo an agent for the *ſeller*, or an *executor*.

IF the agent of a perſon who is abſent ſell ground on account of his conſtituent, the *Shafee* may claim his right and obtain the ground from the agent, provided it be in his poſſeſſion. The ſame rule alſo holds in the caſe of an executor authorized to ſell lands.

The *Shafee*, after gaining his ſuit, has an option of *inſpection*, and alſo an

IF the *Kázee* decree in favour of the *Shafee*, at a time when he has not yet ſeen the property in diſpute, he [the *Shafee*] has an option of inſpection; and if any defect be afterwards diſcovered in it, he has an option from defect *, and may, if he pleaſe, reject it, notwithſtanding

---

* *Option of inſpection* and *option from defect* are fully explained under the head of SALE. See Vol. II. p. 396, and 406.

ſtanding the purchaſer ſhould have excepted ſuch defect from the bargain, or, in other words, ſhould have exempted the ſeller from reſponſibility for ſuch defect; becauſe, as the transfer of property by right of *Shaffa* is the ſame as a transfer of property by ſale, the *Shafee* has therefore, under both the above circumſtances, the power of rejection, in the ſame manner as any other purchaſer; and this power in the *Shafee* is not deſtroyed by the purchaſer having ſeen the property, or having ſo exempted the ſeller; for he [the purchaſer] was not deputed by the *Shafee*, and his act, of courſe, does not affect the *Shafee*'s power of rejection.

option *from defect.*

SECTION.

Of Diſputes relative to the Price.

In diſputes concerning the price, the aſſertion of the purchaſer, upon oath, muſt be credited;

IF the purchaſer and *Shafee* differ regarding the price, the former alledging *one hundred*, for inſtance, and the latter only *eighty*, and neither of them be able to bring any evidence, the aſſertion of the purchaſer muſt be credited in preference to that of the *Shafee*; becauſe here the *Shafee* alleges a right in the purchaſer's property for a ſum *ſhort* of one hundred, which the purchaſer denies; and, according to the LAW, the declaration of a defendant, upon oath, muſt be credited:—neither is the oath of both parties * required in this caſe; for the *Shafee* is plaintiff againſt the purchaſer, but the purchaſer is not plaintiff againſt the *Shafee*, he being at liberty either to claim or reſign the thing in queſtion; and it is a rule that both parties cannot be called on to ſwear, unleſs where both are in ſame manner plaintiff, or in ſame particular caſes, where it is expreſsly ordained by the LAW, neither of which reaſons exiſt in the preſent inſtance.

---

* Arab. *Tahâlif.*—For a full explanation of this term ſee p. 83 of this Vol.

and ſo likewiſe *evidence* produced by him;

IF both the purchaſer and the *Shafee* produce evidence, that produced by the *Shafee* muſt be credited, according to *Haneefa* and *Mohammed.*—*Aboo Yooſaf*, on the contrary, maintains that the evidence produced by the *purchaſer* muſt be credited; becauſe it proves a larger ſum than the other, and it is a general rule that regard is had to the evidence which proves the moſt;—as where, for inſtance, a difference ariſes regarding the amount of the price betwixt a purchaſer and a ſeller, or an agent and his conſtituent, or a perſon who buys a thing from an infidel enemy, and the original proprietor of the thing;—in all which caſes, if both parties bring evidence, the evidence of him who proves the largeſt ſum is admitted.—The difference here alluded to, betwixt one who buys a thing from an infidel enemy, and the former proprietor of the thing, will be better elucidated by the following caſe.—A *Muſſulman* merchant goes upon a voyage, arrives in the country of the infidels, receives their protection, and, whilſt he remains there, purchaſes a ſlave, who had formerly belonged to *Zeyd*, from an infidel, who had carried him away as his plunder; and, on the merchant's return, *Zeyd* claims his ſlave, offering the price which the merchant had given to the infidel; but a difference ariſing betwixt them regarding the amount of the price, both adduce evidence to prove the ſum they aſſerted;—in which caſe the evidence of the merchant, which goes to prove the largeſt ſum, is admitted, in preference to that of *Zeyd.*—In ſupport of the opinion maintained by *Haneefa* and *Mohammed* on this point, two arguments may be urged.—FIRST, the evidence of the *Shafee* ſubjects the purchaſer to an obligation; whereas the evidence of the purchaſer does not ſubject the *Shafee* to any obligation, ſince he has it in his option to take the thing in diſpute or not; and the intention of eſtabliſhing evidence is to impoſe an obligation.—SECONDLY, if it be poſſible, a regard ſhould be paid to the evidence of both parties; and here it is poſſible, for there is no abſolute contradiction in the allegations of the two parties, ſince the purchaſer may perhaps have *twice* purchaſed the thing; and both purchaſes being thus apparently proved, it remains in the option of the *Shafee* to prefer whichever he pleaſes; that is to ſay, if the purchaſer have bought the thing twice, *viz.* once for one thouſand, and another time for two thouſand, the *Shafee* has it in his option to take the thing for whichever of theſe prices he thinks proper.—With reſpect to the analogy urged by *Aboo Yooſaf* betwixt the caſe in queſtion and that of a purchaſer and a ſeller differing concerning the amount of the price, it cannot be admitted; for if two different ſales take place betwixt the parties, one immediately after the other, regarding the ſame thing, the one ſale invalidates the other; and it being thus impoſſible to admit the allegations and evidence of both parties, that evidence which proves the largeſt ſum muſt be ſuperior; and the ſuperiority is therefore allowed to the evidence of the ſeller over that of the purchaſer, becauſe it proves the largeſt ſum. In the caſe of the *Shafee*, on the contrary, as the maxim of one ſale invalidating the other does not affect him, both the ſales hold good with reſpect to him;—whence if the purchaſer chuſe to purchaſe the ſame thing twice, the *Shafee* has it in his option to take it for either of the prices, as has been mentioned above. Beſides, as an agent is ſuppoſed to ſtand in the place of a ſeller, and his conſtituent in that of a purchaſer, the ſame laws will of courſe hold with reſpect to them as are eſtabliſhed in the caſe of a buyer and a ſeller; and this is confirmed by a precept quoted from *Mohammed*, in which it is expreſsly ſaid, that "the evidence brought "by the conſtituent is preferable."—With reſpect, alſo, to the analogy urged [by *Aboo Yooſaf*] betwixt the caſe in queſtion and that of a diſpute between the purchaſer of a ſlave from an infidel and the former maſter of ſuch ſlave, it is entirely unfounded, ſince it cannot be admitted that the effect of the *branch* is the ſame as that of the *root*, as we find it expreſsly declared in the *Seyir Kabeer*, that the evidence adduced by the former maſter of the ſlave is ſuperior. But even admitting the above-mentioned propoſition, ſtill the argument is of no weight; for in the caſe of the merchant two bargains could not be made ſucceſſively without the one of them being invalidated; whereas in the caſe of the *Shafee* (as we have already obſerved) both bargains may be effective.

and alſo his aſſertion, if the ſeller alledge a larger amount.

If the ſeller and purchaſer differ regarding the price, and the ſeller (ſuppoſing him not yet to have received it) alledge the ſmalleſt ſum, the *Shafee* may take the houſe for the price alledged by the ſeller, the aſſertion made by him of a ſmaller ſum being conſidered as an abatement in favour of the purchaſer, of which the *Shafee* is entitled to avail himſelf. We ſhall have occaſion in the enſuing ſection to explain the ground on which this law is founded; and ſhall therefore in this place aſſign only one reaſon, namely, that the right given to the *Shafee* over the ſeller ariſes from his own declaration, in ſaying "I "have ſold it for ſuch a price;" and therefore ſo long as he has not received the price, his allegation muſt be credited regarding it,—whence the *Shafee* is entitled to take the property at a rate agreeable to his aſſertion.—If, on the contrary, the ſeller alledge the largeſt ſum, both parties muſt be required to ſwear, and the contract of ſale is then diſſolved. If, in this caſe, either of them refuſe to ſwear, that price is eſtabliſhed which has been ſet forth by the other, and the *Shafee* is conſequently entitled to take the houſe for that amount. If, on the other hand, both parties ſwear, the *Kázee*, at the requiſition of one or both of them, muſt diſſolve the ſale; and the *Shafee* (whoſe right is not to be prejudiced by ſuch diſſolution) may then take the houſe for the amount alleged by the ſeller.

If the ſeller ſhould have received the price, the *Shafee* may take the houſe for the amount ſet forth as the price by the purchaſer; and here the allegation of the ſeller is of no weight or credit, for having received the price, the ſale, as far as relates to him, is finally concluded, and he becomes only as a ſtranger; the diſpute then lying betwixt

Digitized by Google

betwixt the purchaſer and the *Shafee*, regarding which we have already been very explicit in a former part of this ſection.

Case in which the ſeller's aſſertion may be credited concerning the price.

If the *Shafee* be not apprized of the ſeller's having received the price, and the ſeller ſhould ſay "I have ſold the property for one "thouſand *dirms*, which I have received," in this caſe the *Shafee* is entitled to take the property for one thouſand *dirms*; for, as the beginning of the ſeller's ſpeech, in which he acknowledges the ſale, creates the *Shafee*'s right of *Shaffa*, the ſubſequent ſentence, in which he aſſerts his having received the price, as tending to extinguiſh that right which he has himſelf created, muſt not be admitted. But if the ſeller ſhould ſay "I have ſold the ground and received the price," and then ſhould add "which was one thouſand *dirms*," his evidence with reſpect to the amount of the price cannot be admitted, becauſe by the prior acknowledgment of his having received the price, he becomes like a ſtranger, and has no further concern or intereſt in the matter.

SECTION.

Of the Articles in lieu of which the Shafee *may take the* Shaffa *Property.*

The *Shafee* is entitled to the benefit of any *abatement* made to the purchaſer, but not to that of a *total remiſſion*.

If the ſeller abate a part of the price to the purchaſer, the *Shafee* is entitled to the benefit of ſuch abatement; whereas if the ſeller, after the ſale, remit the *whole* of the price to the purchaſer, the *Shafee* is not allowed to avail himſelf of ſuch indulgence. The reaſon of this diſtinction is, that an abatement of a *part* is an act connected with,

Digitized by Google

with, and referring to, the original bargain or ſale; and the *Shafee* is entitled to the benefit of it, becauſe that ſum which remains after deducting the abatement is the price; whereas an *entire remiſſion* has no connexion with the original bargain. In the ſame manner alſo, if the ſeller abate a part of the price, *after* the *Shafee* has become ſeized of his *Shaffa* property, he [the *Shafee*] is entitled to the benefit of ſuch abatement, and accordingly receives back the amount abated by the ſeller to the purchaſer.

He is not liable for any *augmentation* agreed upon after the ſale.

If, on the contrary, the purchaſer, after the bargain is concluded, agree to an augmentation of the price in favour of the ſeller, the *Shafee* is not liable for ſuch augmentation; becauſe his privilege of *Shaffa* is eſtabliſhed for the price originally ſettled; and if any ſubſequent augmentation were admitted to operate with reſpect to him, it would be a loſs to him; whereas, on the contrary, any ſubſequent *abatement* is a *benefit*. Analogous to this caſe of *augmentation* is that formerly ſtated, in which it was remarked, that if a man make a purchaſe for a certain price, and afterwards renew the purchaſe of the ſame thing, and ſettle a large price, the *Shafee* is not prejudiced by ſuch augmentation, but is entitled to his *Shaffa* for the price firſt agreed upon.

If the price conſiſt of *effects*, the *Shafee* may take it on paying the *value* of thoſe effects; but if it conſiſt of *ſimilars*, he is to pay an equal quantity of the ſame;

If a man ſell a houſe for a certain quantity of goods or effects, the *Shafee* is entitled to take it for the *value* of ſuch effects; for *effects* are amongſt the things denominated *Zooàt-al-Keem*, or things which, being eſtimable, are compenſable by an equivalent in money.—If, on the other hand, a man ſell a houſe for a compenſation in wheat, ſilver, or any other article eſtimable by meaſure or weight, the *Shafee* may take it for an equal quantity of the ſame article; becauſe theſe are of the claſs of *Zooàt-al-Imſàl*, or things compenſable by an equal quantity of the ſame ſpecies. The reaſon of this is that the revealer

Digitized by Google

of the LAW [*] has eſtabliſhed in the *Shafee* a right to take poſſeſſion of the property of the purchaſer, on giving him a compenſation ſimilar to the price which he has paid;—it is therefore neceſſary that a ſimilarity betwixt the compenſation and price be obſerved as nearly as poſſible, in the ſame manner as in caſes of *deſtruction* of property.—(It is to be obſerved that articles which differ very little in their unities, ſuch as walnuts or eggs, are included under the denomination of *Zooàt-al-Imſâl*, or things compenſable by an equal quantity of the ſame ſpecies. If, therefore, a man purchaſe ground for walnuts or eggs, the *Shafee* may give him a compenſation in walnuts or eggs, and is not required to pay an equivalent in money.)

and ſo likewiſe; if the price conſiſt of *land*.

IF a man ſell a piece of ground for another piece of ground, in this caſe, as each piece of ground is the price for which the other is ſold, the *Shafee* of each piece is entitled to take it for the value of the other, land being of the claſs of *Zooàt-al-Keem*, or things compenſable by an equivalent in money.

In caſe of a term of credit, the *Shafee* may either wait the expiration of the term, or take the property immediately, upon paying the price.

IF a houſe be ſold for a price payable at a diſtant period, the *Shafee* may either wait until that period be expired, and then take the houſe for the ſame price,—or he may take it immediately, on paying the price in ready money: but he is not entitled to take it immediately and demand a reſpite to the period ſettled by the purchaſer. *Ziffer* maintains that the *Shafee* is entitled to take the houſe immediately, and demand a reſpite of the payment; (and ſuch alſo is the opinion of *Shafei*;) for the reſpite is a modification of the price, in the ſame manner as if it were ſtipulated to be paid in coin of an inferior ſpecies; and as the *Shafee* is entitled to take the houſe for the price itſelf, he is of courſe entitled to take it for the price under its modification. The argument adduced by us, in ſupport of the former opinion, is that a delay or reſpite cannot be eſtabliſhed but by a poſitive ſtipulation betwixt the parties; and in the preſent caſe there is not any ſtipulation, either betwixt the *Shafee* and the ſeller, or the *Shafee* and the purchaſer:—nor can the ſeller's conſenting to a reſpite in favour of the purchaſer be conſtrued into a conſent to reſpite in favour of the *Shafee*; for men, as they differ in their circumſtances, are more or leſs capable of diſcharging their debts.—With reſpect, moreover, to the arguments uſed in behalf of *Ziffer*'s opinion, it is true that the reſpite is a modification of the price; yet the law is not to be bent thereby; for the reſpite is, in fact, a right of the purchaſer; but if it were admitted a modification of the price, it would be a right of the ſeller, like the price itſelf;—this caſe being analogous to where a man purchaſes a thing for a price payable at a diſtant time, and afterwards ſells it again by a *tawleeat* ſale;—in which inſtance, if no ſuch ſtipulation be expreſſed, the ſecond purchaſer is not entitled to a term of credit,—and ſo here likewiſe.—If, in the caſe here conſidered, the land be ſtill in the poſſeſſion of the ſeller, and the *Shafee* take it and pay him the price in ready money, his [the ſeller's] claim againſt the purchaſer ceaſes; for the bargain with reſpect to him is diſſolved, and the *Shafee* is ſubſtituted in his place, as has been already explained.—If, on the contrary, the land be in the poſſeſſion of the purchaſer, and the *Shafee* take it from him, ſtill the ſeller muſt allow to the purchaſer the term of credit originally ſettled; becauſe the bargain betwixt them is not diſſolved by the *Shafee*'s taking the land, and the caſe is therefore the ſame as where a perſon makes a purchaſe upon credit, and then ſells the article for ready money, in which caſe the firſt ſeller is not entitled to demand ready money from him. It is, however, lawful for the *Shafee* to defer taking the land until the term of credit be expired: but he muſt make his demand without delay; for if he neglect to make an immediate demand, his right of *Shaffa*, according to *Haneefa* and *Mohammed*, becomes null:—contrary to the opinion of *Aboo Yooſaf*.—The reaſon for the opinion of *Haneefa* and *Mohammed* upon this head is, that as the *Shaffa* has exiſtence from the time of the ſale, it is therefore requiſite that the claim be made upon the inſtant of the ſale being known. The reaſon for *Aboo Yooſaf*'s opinion is that “the only uſe of the claim is to enable the *Shafee* to take the land,” which end cannot be *at preſent* effected, whence he remains ſilent; and as this ſilence does not argue any receſſion from his right, that is conſequently not invalidated. To this, however, it may be replied, that the taking of the land is a matter poſterior to the claim; and the *Shafee* has it, moreover, in his power to take it on the inſtant, by paying down the price.

---

[*] Meaning, the *prophet*, who is often termed *Shàri*, or the *lawgiver*.

Caſe of property ſubject to *Shaffa*, purchaſed by a *Zimmee* for a price conſiſting of unlawful articles.

IF a *Zimmee* purchaſe land for wine or pork, and the *Shafee* be alſo a *Zimmee*, he [the *Shafee*] may take the land for an equal quantity of ſimilar wine, or for the value of the pork; becauſe a bargain of this kind is held valid amongſt *Zimmees*; and as the right of *Shaffa* is enjoyed in common by both *Muſſulmans* and *Zimmees*, and wine, amongſt the latter, is held as vinegar amongſt the former, and hogs as ſheep, it follows that, vinegar being included under the denomination of *Zooât-al-Imſâl*, and ſheep under that of *Zooât-al-Keem*, the *Shafee* is at liberty to take the land for an equal quantity of wine, or for the value of the pork. If, on the contrary, the *Shafee* be a *Muſſulman*, he is to take the land for the value of the *wine* as well as of the *pork*; for the giving or receiving of wine amongſt *Muſſulmans* is prohibited by their religion, and it is therefore, with reſpect to them, reckoned alſo amongſt the things which are of the denomination of *Zooât-al-Keem.*—If, on the other hand, there be two *Shafees*, the one a *Muſſulman* and the other a *Zimmee*, the former muſt take half of the land for half the *value* of the wine, and the latter the other half, for half the *quantity* of the wine.—If, alſo, the *Zimmee Shafee* become a *Muſſulman*, as his right is *ſtrengthened*, not *invalidated*, by his converſion, he is therefore to take his half of the land for half of the *value* of the wine; becauſe, by his embracing the faith, he is incapacitated from paying the actual *wine*, which then (as it were) becomes non-exiſtent with reſpect to him;—in the ſame manner as where a perſon makes a purchaſe of a houſe for a meaſure of green dates, and a *Shafee* afterwards appears, at a time when the ſeaſon for green dates is paſt, in which caſe he muſt take the houſe for the value of the dates,—and ſo likewiſe in the preſent inſtance, as wine is, in effect, non-exiſtent with reſpect to *Muſſulmans*, they being prohibited, by the LAW, from uſing it in any ſhape.

SECTION.

The *Shafee* may either take the buildings or plantations of the purchaſer, (paying the value) or may cauſe them to be removed.

If the purchaſer of ground ſubject to a claim of *Shaffa* erect buildings or plant trees upon it, and the *Kâzee* afterwards order the ground to be delivered to the *Shafee*, it in this caſe reſts with him [the *Shafee*] either to take the ground, together with the building or trees, paying the value of both, or to oblige the purchaſer to remove them. This is the doctrine of the *Zâhir Rawâyet*. It is recorded from *Aboo Yooſaf* that the *Shafee* cannot oblige the purchaſer to remove his buildings; but he muſt either take the ground, paying the value of the trees or buildings, or relinquiſh the whole. This is alſo the opinion of *Shafeï*. He, however, admits that the *Shafee* may cauſe the buildings or the trees to be removed, on indemnifying the purchaſer in the loſs he may thereby ſuſtain. In ſhort, according to him, the *Shafee* has three things in his option; for he may either take the land, together with the trees and buildings, paying the value of thoſe,—or he may cauſe them to be removed, indemnifying the purchaſer,—or, laſtly, he may relinquiſh the whole.. In ſupport of the opinion of *Aboo Yooſaf* two arguments are urged. FIRST, the purchaſer was juſtifiable in erecting the buildings, ſince the ground was his own property, and it would therefore be unjuſt to oblige him to remove them;—in the ſame manner as where ground is for a ſhort time tranſferred by a grant, or by a defective ſale, and afterwards taken back,—in

Digitized by Google

in which caſe the granter or the ſeller has it not in his power to oblige the grantee or the purchaſer to remove any buildings he may have raiſed upon the ground whilſt it was in his poſſeſſion,—or (in caſes of *Shaffa*) where the purchaſer has raiſed a crop of grain from the ground,—in which caſe the *Shafee* cannot oblige him to remove it until it be fit for reaping.—SECONDLY, in the preſent caſe one of two grievances muſt follow; for either the *Shafee* muſt ſuffer a grievance in being obliged to pay an enhanced price for his *Shaffa* on account of the additional value of the buildings, or elſe the purchaſer muſt ſuffer a grievance in being compelled to remove them. Now the latter of theſe grievances is the heavieſt, for it is a loſs without any recompenſe; whereas the increaſe of price paid by the *Shafee* is not without a conſideration;—and where the *Shafee* either takes the ground, paying for the trees and buildings, or relinquiſhes the whole, the greater of the two grievances is obviated, and the ſmaller one only is induced. The reaſons urged in behalf of the opinion quoted from the *Zâhir Rawâyet* are, that as the purchaſer has planted trees or erected buildings on ground over which the rights of another extend, without firſt obtaining the ſanction of that other, they muſt be removed, in the ſame manner as where a perſon who holds ground in pledge builds upon it without the permiſſion of the pledger.—Beſides, the right of the *Shafee* is ſtronger than that of the purchaſer, as being of prior date; whence it is that any act of the purchaſer, even ſuch as the ſelling or granting of the ground, may be diſſolved. It is otherwiſe with reſpect to a grantee, or a purchaſer under an invalid contract, (according to *Haneefa*;) becauſe they act under a permiſſion from the poſſeſſor of the right; and alſo, becauſe the right of reſumption, in caſes of gift or invalid purchaſe, is but of a weak nature,—whence it diſcontinues upon the erection of buildings. The right of *Shaffa*, on the contrary, ſtill continues in force; and therefore the rendering abſolutely obligatory the value of the trees or buildings, upon the *Shafee*, in caſe of his claiming his right, would be abſurd; in the ſame manner

as

as holds in caſes of *claim of right* [*];—in other words, if a perſon purchaſe land, and plant or build upon it, and it afterwards prove the right of another, the purchaſer recovers the price of the land and the value of the trees and buildings from the ſeller, and not from the *claimant of right*; and in the preſent inſtance the *Shafee* ſtands as the *claimant of right*. Analogy would ſuggeſt that grain alſo ſhould be removed from the land; but, by a more favourable conſtruction of the LAW in this particular, it is not to be removed; becauſe the term of its continuance is limited and aſcertainable; and as the delay may be recompenſed to the *Shafee* by a rent or hire, it cannot therefore be very grievous to him.

The *Shafee* is not entitled to any remuneration for buildings erected or trees planted on land which proves the property of another:—but he may *remove* them.

IF a *Shafee*, having obtained poſſeſſion of his *Shaffa* land, erect buildings, or plant trees upon it, and it afterwards appear that the land was wrongfully ſold, being the property of another, the *Shafee* recovers the price,—from the *ſeller*, where he had taken the land from *him*,—or from the *purchaſer*, where he had taken it from *him*; becauſe it is evident that it was wrongfully taken. He is not, however, entitled to recover from either party the value of his buildings or trees, but is at liberty to carry them wherever he pleaſes.—It is recorded from *Aboo Yooſaf* that the *Shafee* may alſo recover the value of the buildings or trees from the perſon from whom he received the ground; becauſe that perſon, under ſuch circumſtances, is conſidered as the ſeller, and the *Shafee* as the purchaſer; and it is an eſtabliſhed rule that the purchaſer may recover from the ſeller the value of ſuch buildings as he has erected on the ground, if it appear that the ground ſold to him was not the property of the ſeller, but of another perſon. There is, however, a difference, in this caſe, betwixt a *Shafee* and an ordinary purchaſer; for the latter is *deceived* by the ſeller, and is empowered by him to take the ground,—whereas the *Shafee* is not deceived by the purchaſer, nor can he be ſaid to be empowered by him to take the ground, ſince the purchaſer himſelf is *compelled*, the *Shafee* taking poſſeſſion of the ground without his conſent.

---

[*] Arab. *Iſtihkâk*, meaning, a claim ſet up to the ſubject of a ſale. (See Vol. II. p. 503.)

If the property have ſuſtained any accidental or natural injury after ſale, ſtill the *Shafee* cannot take it for leſs than the *full price*.

IF a man purchaſe a houſe or garden ſubject to a claim of *Shaffa*, and the building (owing to ſome unforſeen calamity) be deſtroyed, or the trees decay, it reſts in the option of the *Shafee* either to reſign the houſe or garden, or to take it and pay the full price; becauſe, as buildings or trees are mere appendages of the ground, (whence it is that they are included in the ſale of land without any particular mention being made of them,) no particular part of the price is ſet againſt them,—unleſs where they have been wilfully deſtroyed by the purchaſer, in which caſe it is lawful for him [the purchaſer] to ſell the appendages ſo deſtroyed, and make a profit by them, excluſive of the full price of the ground. It is otherwiſe when one half of the ground is inundated; for in ſuch caſe the half of the thing itſelf being deſtroyed, the *Shafee* may take the remainder, paying only half the original price.

If the injury be committed by the purchaſer, the *Shafee* may take the *ground* alone at its eſtimated value.

IF the purchaſer wilfully break down the erections, the *Shafee* may either reſign his claim, or may take the area of ground for a proportionable part of the original price; but he is not entitled to the ruins, becauſe they are become a ſeparate property, and are no longer appendages of the ground; and the right of *Shaffa* extends only to the ground, and to things ſo attached to it as to be *appendages*.

Caſe of a *Shafee* taking ground with fruit trees.

IF a man purchaſe a piece of ground, having date trees upon it bearing fruit at the time, the *Shafee* is entitled to take the fruit,—provided particular mention have been made of it in the ſale, for otherwiſe it is not comprehended. What is here advanced proceeds upon a favourable conſtruction. Analogy would ſuggeſt that the *Shafee* is not entitled to take the fruit; becauſe, as the fruit is a dependant both of the tree and of the ground, (whence it is not included in a ſale of ground unleſs it be particularly mentioned,) it therefore reſembles the furniture of a houſe. The reaſon for a more favourable conſtruction, in this particular, is that the fruit, in conſequence of its connexion with the tree, is a dependant of the land, in the ſame manner as an erection, or any thing inſerted in the wall of a houſe, ſuch as a *door*, for inſtance; and therefore the *Shafee* is entitled to take it. The ſame rule alſo holds where the ground is purchaſed at a time when there is no fruit upon the trees, and the fruit is afterwards produced whilſt it [the ground] is yet in the purchaſer's poſſeſſion;—in other words, the *Shafee* is here alſo entitled to take the fruit, becauſe that is a dependant of the original article; in the ſame manner as in the caſe of a female ſlave who is ſold,—if ſhe be delivered of a child previous to her being given over to the purchaſer, ſtill the child, as well as its mother, is the property of the purchaſer.

In either of the two preceding caſes, if the purchaſer have gathered the fruit, and the *Shafee* afterwards come and claim his privilege, he is not entitled to the fruit ſo gathered; for it is no longer an appendage of the ground. It is ſaid, in the *Mabſoot*, that if the purchaſer have gathered any of the fruit, a proportionable abatement ſhould be made in the price to the *Shafee*. The compiler of the *Hedáya* remarks, that this is in the *former* only of the two above-mentioned caſes; for the fruit being produced at the time, and being actually and expreſsly included in the ſale, it is natural to ſuppoſe that a part of the price was given in conſideration of it; whereas, in the latter caſe, the fruit was not produced, and could only be included in the ſale as a *conſequent*, whence no part of the price could have been ſet againſt it.

CHAP. III.

Of the Articles concerning which *Shaffa* operates.

The right of *Shaffa* holds with reſpect to all immoveable property,

THE privilege of *Shaffa* takes place with reſpect to immoveable property, notwithſtanding it be incapable of diviſion, ſuch as a bath, a mill, or a private road. *Shafeï* maintains that nothing is ſubject to *Shaffa* but what is capable of being divided; becauſe (according to his tenets) the end of *Shaffa* is to obviate the inconveniences attending a diviſion of property, which does not hold in a property incapable of diviſion. Our doctrine, however, is grounded on a precept of the prophet, who has ſaid "SHAFFA *takes place with regard to all lands* "*or houſes.*" Beſides, according to *our* tenets, the grand principle of *Shaffa* is the conjunction of property, and its object (as we have already explained) to prevent the vexation ariſing from a diſagreeable neighbour; and this reaſon is of equal force whether the thing be diviſible or otherwiſe.

THE privilege of *Shaffa* does not extend to houſehold effects or ſhipping *; becauſe of a ſaying of the prophet, "SHAFFA *affects only* "*houſes and gardens*;" and alſo, becauſe the intention of *Shaffa* being to prevent the vexation ariſing from a bad neighbour, it is needleſs to extend it to property of a moveable nature.

unleſs it be ſold ſeparate from the

IT is obſerved, in the abridgment of *Kadooree*, that *Shaffa* does not affect even a *houſe* or *trees* when ſold ſeparately from the ground on which it ſtands.

---

* The term, in the original, ſignifies *boats*, including every ſpecies of water-carriage.

on which they ſtand. This opinion (which is alſo mentioned in the *Mabſoot*) is approved; for as buildings and trees are not of a permanent nature, they are therefore of the claſs of *moveables*. There is, however, an exception to this in the caſe of the upper ſtory of a houſe; for it is ſubject to *Shaffa*,—whence the proprietor of the under ſtory is the *Shafee*, as is alſo the proprietor of the upper the *Shafee* of the under one, notwithſtanding their entries be by different roads.

A *Muſſulman* and a *Zimmee* are on an equality with reſpect to it.

A Mussulman and a *Zimmee*, being equally affected by the principle on which *Shaffa* is eſtabliſhed, and equally concerned in its operations, are therefore on an equal footing in all caſes regarding the privilege of *Shaffa*; and for the ſame reaſon, a man or a woman, an infant or an adult, a juſt man or a reprobate, a freeman or a ſlave, (being either a *Mokâtib* or a *Mazoon*,) are all equal with reſpect to *Shaffa*.

It holds with reſpect to property transferred in any ſhape *for a conſideration*.

When a man acquires a property in lands for a conſideration, (in the manner, for inſtance, of a *grant* for a conſideration,) the privilege of *Shaffa* takes place with reſpect to it, becauſe it is in the power of the *Shafee* to fulfil the ſtipulation.

It does not hold in a property aſſigned in *dower*, or as a compenſation for *Khoola*, or as a *hire*, or in compoſition for *murder*, or as the price of *manumiſſion*.

The privilege of *Shaffa* cannot take place relative to a houſe aſſigned by a man as a dower to his wife, or by a woman to her huſband as the condition on which he is to grant her a divorce, or which is ſettled on a perſon as his hire or reward, or made over in compoſition for wilful murder, or aſſigned over as the ranſom of a ſlave; for with us it is a rule that *Shaffa* ſhall not take place unleſs there exiſt an exchange of property for property, which is not the caſe in any of theſe inſtances, as the matters to which the houſe is oppoſed are not property. *Shafeï* holds *Shaffa* to take place in all theſe caſes; becauſe, although the matter to which the houſe is oppoſed be not property, it is nevertheleſs capable of eſtimation, (according to his tenets,) and

Digitized by Google

therefore the houſe may be taken upon paying the value of the matter to which it is oppoſed, in the ſame manner as in the ſale of a property for a conſideration in goods or effects. It is to be obſerved, however, that this opinion of *Shafeï* obtains only with reſpect to a caſe where a *part* of a houſe is aſſigned as a dower, or made over as a conſideration for *Khoola*, a compoſition for murder, and ſo forth; for, according to his tenets, there is no *Shaffa* except in caſes of *joint property*.

It holds with reſpect to a houſe *ſold* in order to pay the dower.

IF a man marry a woman without ſettling on her any dower, and afterwards ſettle on her a *houſe* as a dower, the privilege of *Shaffa* does not take place, the houſe being here conſidered in the ſame light as if it had been ſettled on the woman at the time of the marriage.—It is otherwiſe where a man ſells his houſe in order to diſcharge his wife's dower either *proper* or *ſtipulated*; becauſe here exiſts an exchange of property for property.

IF a man, on his marriage, ſettle a houſe upon his wife as her dower, and ſtipulate that ſhe ſhall pay him back, from the price of the houſe, one thouſand *dirms*, according to *Haneefa* the privilege of *Shaffa* does not take place relative to that houſe; whereas the two diſciples hold that it affects a *part* of the houſe equivalent to one thouſand *dirms* *.

It does not hold with reſpect to a houſe the poſſeſſion of which is compromiſed by a ſum of money.

THE privilege of *Shaffa* does not operate relative to a houſe concerning which there has been a diſpute betwixt two men, compromiſed by the defendant (who was the poſſeſſor) paying the plaintiff a ſum of money, after denying his claim; for in this caſe, the compromiſe being made after the denial, the houſe, in the imagination of the defendant, ſtill belongs to him under his original right of property,

---

* The reaſonings on both ſides are here recited at large; but are omitted in the tranſlation, as containing merely a ſtring of metaphyſical ſubtilties of little or no uſe.

and conſequently no ſale or exchange of property for property can here be eſtabliſhed in regard to him;—and ſo likewiſe if he refuſe to anſwer to the ſuit, and then compromiſe it with a ſum of money,—ſince it may be ſuppoſed that he has parted with his money rather than be under the neceſſity of taking an oath, even with truth on his ſide, or of involving himſelf in litigious diſputes and broils. If, on the contrary, he *confeſs* the juſtneſs of the plaintiff's claim, and then compromiſe with a ſum of money, the privilege of *Shaffa* takes place; becauſe as he has here acknowledged the plaintiff's right to the houſe, and retained it afterwards in virtue of a compromiſe, an exchange of property for property is clearly eſtabliſhed in this inſtance.

It holds with reſpect to a houſe made over in *compoſition*:

If a defendant compromiſe a ſuit by reſigning or making over a *houſe* to the plaintiff, after having either denied his claim or acknowledged it, or refuſed to anſwer it, the right of *Shaffa* is eſtabliſhed with reſpect to the houſe; becauſe, as the plaintiff here accepts the houſe in conſideration of what he conceives to be his right, he is therefore [in adjudging the right of *Shaffa* againſt him] dealt with according to his own conceptions.

but not with reſpect to property tranſferred by *grant*.

The privilege of *Shaffa* is not admitted in the caſe of grants,—unleſs when the grant is made for a conſideration, in which caſe it is, in effect, ultimately a *ſale*. Still, however, the privilege of *Shaffa* cannot be admitted, unleſs both parties have obtained poſſeſſion of the property transferred to them by the terms of the grant; (nor if the thing granted on either ſide be an indefinite part of any thing;) for a grant on condition of a return is ſtill a grant in its *beginning*, as has been already explained in treating of *gifts*. It is further to be obſerved that the privilege of *Shaffa* cannot be admitted, unleſs the return be expreſſed as a condition on making the grant; for if it be not ſo expreſſed, and the parties give to each other reciprocal preſents, theſe preſents on both ſides are held as pure *grants*, although each of them having met with a requital of his generoſity, neither is allowed the power of retreating.

It cannot take place with reſpect to a property *ſold* under a condition of option:

IF a man *ſell* his houſe under a condition of option *, the privilege of *Shaffa* cannot take place with reſpect to that houſe, the power reſerved by the ſeller being an impediment to the extinction of his right of property: but when he relinquiſhes that power, the impediment ceaſes, and the privilege of *Shaffa* takes place, provided the *Shafee* prefer his claim immediately. This is approved.

but it holds with reſpect to a property ſo *purchaſed*;

IF, on the contrary, a man *purchaſe* a houſe under a condition of option, the privilege of *Shaffa* takes place with reſpect to it; for ſuch a power reſerved by the *purchaſer* is held, in the opinion of all the learned, to be no impediment to the extinction of the ſeller's right of property; and the right of *Shaffa* is founded and reſts upon the extinction of the ſeller's right of property, as has been already explained.

and on the *Shafee* taking poſſeſſion, the purchaſer's right of option ceaſes.

IF the *Shafee* take the houſe during the purchaſer's right of option, (namely, three days,) ſuch right ceaſes, and the ſale is completely concluded; for the purchaſer, as no longer having the houſe in his poſſeſſion, is no longer capable of rejecting it; and the *Shafee* cannot pretend to claim the power of diſſolving the bargain, ſince that power was founded in a condition eſtabliſhed in favour of the purchaſer only.

In a caſe of ſale upon option, the poſſeſſor of the

IF, whilſt one of the parties, either purchaſer or ſeller, has the power of diſſolving the bargain, the houſe adjoining to the one in queſtion be ſold, he who poſſeſſed ſuch power is the *Shafee* of the adjoining

---

* That is, "reſerving to himſelf the power of hereafter diſſolving the ſale." (See Vol. II. p. 362 to 406.

Digitized by Google

option is *Shafee* of the adjacent property.

joining houſe.—If it be the *ſeller*, he is the *Shafee*, becauſe whilſt he retained the power of diſſolving the bargain, his right of property remained unextinguiſhed;—or, if it be the *purchaſer*, his claiming the *Shaffa* of the ſecond houſe is a proof of his inclination to keep the firſt, and not to avail himſelf of his power of diſſolving the bargain:—his right of property is therefore held to commence from the time of adjuſting the bargain; and in conſequence of his right of property in the firſt houſe, he has the right of *Shaffa* with reſpect to the ſecond. If, in this caſe, the *Shafee* of the firſt houſe ſhould afterwards come and claim his right, he is entitled to the *Shaffa* of the firſt houſe;—but he is not entitled to that of the *ſecond*, becauſe the firſt houſe was not his property at the time when the ſecond was ſold.

If a man purchaſe a houſe without ſeeing it, and afterwards, in virtue of his privilege of *Shaffa*, take the adjacent houſe, which happens to be ſold, ſtill his power of rejecting the firſt houſe on ſeeing it does not ceaſe; for as it would not be annulled even by an *expreſs* renunciation, it conſequently is not annulled by an act which affords only a *preſumption* of renunciation.

The right does not hold with reſpect to a property transferred under an *invalid* ſale.

The privilege of *Shaffa* cannot take place regarding a houſe transferred by an invalid ſale, either before or after the purchaſer obtaining poſſeſſion of it; for, before the purchaſer obtains poſſeſſion, the houſe belongs as uſual to the ſeller, and his right of property is not extinguiſhed; and after he has obtained poſſeſſion there is ſtill a probability that the bargain may be diſſolved, ſince the LAW admits the diſſolution of a ſale, in a caſe of invalidity, in order to obviate ſuch invalidity, an effect which could not be produced if the privilege of *Shaffa* were allowed. If, however, the purchaſer put an end to the poſſibility of the diſſolution by any particular act, ſuch as by erecting buildings on the ground, or the like, the privilege of *Shaffa* may take place, ſince the impediment then no longer exiſts.

If

Digitized by Google

The ſeller of a property, under an invalid ſale, is ſtill *Shafee* of the adjacent property,

IF the houſe adjacent to one which has been transferred by an invalid ſale be ſold whilſt the one ſo transferred is ſtill in the poſſeſſion of the ſeller, he [the ſeller] is the *Shafee* of the adjacent houſe, becauſe of the continuance of his right in the other.

until he deliver the property ſold to the purchaſer, who then has the right,

IF the ſeller have delivered over the firſt houſe, previous to the *Kâzee* decreeing to him the *Shaffa* of the adjacent one, the purchaſer, becauſe of the property he has acquired in obtaining poſſeſſion of the firſt houſe, is the *Shafee* of the ſecond. It is otherwiſe where the ſeller delivers over the firſt houſe *after* the *Kâzee* has decreed to him the *Shaffa* of the ſecond; for in this caſe his right of *Shaffa* is not invalidated; becauſe, after the decree of the *Kâzee* has paſſed, it is no longer neceſſary that he preſerve his right of property in that houſe from which he derived his right of *Shaffa*.

which, however, fails upon the ſeller reſuming his property.

IF the ſeller take back the firſt houſe, previous to the *Kâzee* decreeing the *Shaffa* to the purchaſer, his [the purchaſer's] right of *Shaffa* becomes null; becauſe his right of property in that houſe from which he derived it has ceaſed previous to its being granted him by a decree of the *Kâzee*. If, on the contrary, the ſeller do not take back the firſt houſe until after the *Kâzee* has decreed the *Shaffa* of the ſecond to the purchaſer, his [the purchaſer's] right of *Shaffa* is not invalidated; becauſe, at the time it was decreed, the houſe from which it was derived was his property; and (as we have already obſerved) after the decree of the *Kâzee* has paſſed it is no longer neceſſary that he preſerve his right of property in that houſe from which he derived his right of *Shaffa*.

A right of *Shaffa* is not created by partners making a *partition* of their joint property.

IF two or more partners divide the ground in which they have hitherto held a joint property, the privilege of *Shaffa* cannot be claimed by any neighbour; becauſe, although the diviſion of joint property bear the characteriſtic of an *exchange*, yet it alſo bears the characteriſtic of a *ſeparation*, namely, a ſeparation of the rights of one perſon from thoſe of others, a thing which may be done by compulſion, ſince any one of the partners may cauſe it to be effected by an application to the *Kázee*, notwithſtanding it be contrary to the inclination of the others. It is not therefore a *pure* exchange, which admits of no compulſion, but muſt be accompliſhed by the concurrence of both parties; and the privilege of *Shaffa* is admitted by the LAW to operate only in caſes of a *pure* exchange.

The right once relinquiſhed cannot afterwards be reſumed.

If a man purchaſe a houſe, and the *Shafee* relinquiſh his privilege, and the purchaſer afterwards reject it in virtue of an option of inſpection, or a condition of option, or by a decree of the magiſtrate in virtue of an option from defect, the *Shafee* is not entitled to claim his privilege, whether the man had ever taken poſſeſſion of the houſe or not; and ſo likewiſe, if the man, before taking poſſeſſion, reject the houſe on diſcovering a blemiſh, without a decree of the *Kázee*; for as, under all thoſe circumſtances, the rejection is a diſſolution of the bargain, the houſe reverts to its original proprietor; and the privilege of *Shaffa* is not eſtabliſhed but on the notification of a new ſale. If, on the contrary, the purchaſer reject the houſe on diſcovering a blemiſh in it, after having taken poſſeſſion without a decree of the *Kázee*,—or, if the ſeller and purchaſer agree to diſſolve the contract,—the privilege of *Shaffa* is eſtabliſhed to the *Shafee*; becauſe in thoſe inſtances the rejection or diſſolution is a *breaking off* with reſpect to the ſeller and purchaſer, inaſmuch as they are their own maſters, and moreover *will* and *intend* a breaking off:—yet with reſpect to others it is not a *breaking off*, but is rather, in effect, a *new ſale*, ſince the characteriſtic of ſale, namely, *an exchange of property for property with the mutual conſent of the parties*, exiſts in it; and as the *Shafee* is *another*, it is therefore a *ſale* with reſpect to him, whence his right of *Shaffa* muſt be admitted.

CHAP.

Digitized by Google

CHAP. IV.

Of Circumſtances which invalidate the Right of *Shaffa*.

If the *Shafee* omit to procure evidence of his having claimed his *Shaffa* on being informed of the ſale, notwithſtanding his ability ſo to do, his right of *Shaffa* is void, becauſe of his neglecting to claim it.—In the ſame manner alſo, if he prefer the *Talb Mawâſibat*, or *immediate* claim, and omit the *Talb Iſh-hâd wa Takreer*, notwithſtanding his ability to make it, his right of *Shaffa* is void, as has been already explained.

A right of *Shaffa* is invalidated by the *Shafee* omitting to procure evidence in due time;

If the *Shafee* agree to compound his privilege of *Shaffa* for a compenſation, he thereby invalidates his right, and is not entitled to the compenſation; for he has no eſtabliſhed *right* or *property* in the place in diſpute, but merely a power of inſiſting on becoming the proprietor in excluſion of the purchaſer; and as, therefore, a renunciation of *Shaffa* (underſtood in renouncing all right to diſturb the proprietor in the enjoyment of the property) is not a ſubject of exchange, it follows that no conſideration can be demanded for it. As, moreover, the relinquiſhment of the right could not lawfully be ſuſpended even upon a *valid* condition, that is, a condition proper to it, (ſuch as a ſtipulation of giving up ſomething in return which is not property,) it follows that it cannot be lawfully ſuſpended upon an *in*valid condition, or condition *not* proper to it, (ſuch as a condition of giving up property in return for a mere *right*, which is *not* property,) *a fortiori*. The condition of a return is therefore null, and the relinquiſhment of the right remains valid *without* a return;—and the caſe of a perſon

or by his offering to *compound* it;

ſelling his right of *Shaffa* is ſubject to the ſame rule.—It is otherwiſe in a caſe of compoſition for retaliation; becauſe retaliation is a right eſtabliſhed againſt the perſon of the murderer in behalf of the repreſentative of the murdered, who is the avenger of his blood.—It is alſo otherwiſe with reſpect to a conſideration received for manumiſſion or divorce; becauſe that is a conſideration for a right of property eſtabliſhed in the *ſubject* of the manumiſſion or divorce.—Analogous to the caſe of relinquiſhment of *Shaffa* for a compenſation by compoſition is that where a man ſays to his wife, being under an option of divorce, " *Chuſe me*, for one thouſand *dirms*," or where an impotent perſon tells his wife that " if ſhe will relinquiſh her right " of diſſolving the marriage he will give her one thouſand *dirms*;" for if, in either of theſe caſes, the wife accept the propoſal, ſhe forfeits the power ſhe poſſeſſed, and the huſband cannot be compelled to pay the compenſation.—Bail for the perſon, alſo, (commonly termed *Hàzir Zàminee*,) bears a reſemblance to *Shaffa* in this particular; for if a perſon who is bail for the appearance of a debtor apply to the creditor and prevail upon him to compromiſe with him, by relinquiſhing his claim on him as ſecurity, for a certain compenſation, the ſurety is in this caſe releaſed from his engagement, and at the ſame time is not liable for the compenſation.—This is one tradition. According to another tradition, the ſurety can neither be made liable for the compenſation, nor yet releaſed from his engagement of bail. Some, alſo, contend that this laſt is the caſe with reſpect to *Shaffa*, whilſt others maintain that the rule applies to bail only.

or by the death of the *Shafee* before the *Kàzee*'s decree.

If the *Shafee* die, his right of *Shaffa* becomes extinct. *Shafeï* maintains that the right of *Shaffa* is hereditary.—The compiler of the *Hedàya* remarks that this difference of opinion obtains only where the *Shafee* dies after the ſale, but previous to the *Kázee* decreeing him the *Shaffa*; for if he die after the *Kázee* has decreed his *Shaffa*, without having paid the price, or obtained poſſeſſion of the property ſold, his right devolves to his heirs, who become liable for the price. The argument of our doctors upon the point in which they differ from *Shafeï* is, that the death of the *Shafee* extinguiſhed his right in the property from which he derived his privilege of *Shaffa*; and the property did not devolve to his heirs until after the ſale. Beſides, it is an expreſs condition of *Shaffa*, that a man be firmly poſſeſſed of the property from which he derives his right of *Shaffa* at the time when the ſubject of it is ſold, a condition which does not hold on the part of the heirs. It is, moreover, a condition that the property of the *Shafee* remain firm until the decree of the *Kâzee* be paſſed; and as this does not hold on the part of the deceaſed *Shafee*, the *Shaffa* is therefore not eſtabliſhed with reſpect to any one of his deſcendants, becauſe of the failure of its conditions.

It is not invalidated by the death of the purchaſer, and therefore cannot be diſpoſed of on his behalf.

IF the purchaſer die, yet the right of *Shaffa* is not extinguiſhed, for the *Shafee* who is entitled to it ſtill exiſts, and no alteration has taken place in the reaſons or grounds of his right. The houſe, therefore, is not to be ſold for the payment of the purchaſer's debts, or diſpoſed of according to his teſtament; and if the *Kâzee* or executor ſell it in order to diſcharge the debts of the eſtate, or if the purchaſer have bequeathed it, the *Shafee* may render any of theſe tranſactions void, and may take the houſe; for the right of the *Shafee* is antecedent,—whence he has the power of annulling the purchaſer's acts with reſpect to the property, even during his lifetime.

It is invalidated by the *Shafee* ſelling the property whence he derived his right;

IF the *Shafee*, previous to the decree of the *Kâzee*, ſell the houſe from which he derives his right of *Shaffa*, the reaſons or grounds of his right being thereby extinguiſhed, the right itſelf is invalidated, notwithſtanding he be ignorant of the ſale of the houſe to which it related;—in the ſame manner as where a man relinquiſhes his *Shaffa* without being informed of the ſale, or acquits a perſon of a debt without knowing the amount; in the firſt of which caſes the right of *Shaffa* is invalidated, and in the ſecond the debtor is acquitted. It is otherwiſe where the *Shafee* ſells his houſe upon a *condition of option*;

for as, whilſt a power of option remains in the ſeller, his property is not totally extinguiſhed, it follows that the ground of *Shaffa* (namely, a *conjunction of property*) ſtill continues.

or by his acting as agent for the ſeller.

If the *Shafee* act as agent of the ſeller, and ſell the houſe on his behalf, his right of *Shaffa* is thereby invalidated;—whereas if he act as agent for the *purchaſer*, and purchaſe the houſe on his behalf, his right of *Shaffa* is not invalidated. In ſhort, it is a rule, that if a perſon, as agent for another, ſell the land, &c. of that other, the right of *Shaffa* in both is thereby invalidated; whereas, if an agent (ſuch as a *manager*, for inſtance) *purchaſe* land, or ſo forth, the right of both continues unaffected; for the former, if he were afterwards to conteſt his right, muſt in ſo doing labour to annul the ſale which was completed by him,—whereas the latter, in ſo doing, does not annul the purchaſe made by him, the taking of a property in virtue of *Shaffa* being itſelf a ſort of purchaſe. In the ſame manner alſo, if the *Shafee* become *Zâmin be'l Dirk*, or *bail for what may happen* *, by engaging to be reſponſible to the purchaſer for the amount of the price in caſe the houſe ſhould afterwards prove the right of another perſon, his right of *Shaffa* is thereby invalidated. So alſo, if a man ſell a houſe, ſtipulating the option of a third perſon, meaning the *Shafee*, and he [the *Shafee*] confirm the ſale, he thereby forfeits his right of *Shaffa*; whereas, if a man *purchaſe* a houſe, ſtipulating the option of a third perſon, who is the *Shafee*, and he [the *Shafee*] confirm the purchaſe, his right of *Shaffa* is not invalidated.

He may reſume his right where he had relinquiſhed it upon miſinformation concerning the *price*,

If intelligence be brought to the *Shafee*, of the houſe which is the ſubject of his right being ſold for one thouſand *dirms*, and he relinquiſh his right of *Shaffa*, and afterwards learn that the houſe was ſold for a leſs price, his reſignation is not binding, and he may ſtill aſſert his right of *Shaffa*; for it was the dearneſs of the price which induced him

---

* For an explanation of this phraſe ſee Vol. II. p. 397.

Digitized by Google

him to reſign; but upon the diminution of the price becoming known, the reaſon of his reſignation no longer exiſts, and it is conſequently void. In the ſame manner alſo, if news be brought that the houſe is ſold for one thouſand *dirms*, and the *Shafee* afterwards learn that it was ſold for a quantity of wheat or barley equivalent to one thouſand *dirms*, or even more, his reſignation is void, and he may ſtill take his *Shaffa*; becauſe it is to be ſuppoſed that his reaſon for reſigning it was his inability to furniſh the amount of the price in that ſpecies (namely, *dirms*) for which he firſt heard the houſe was ſold; but upon his underſtanding that it was ſold for wheat or barley, it is probable that he may be able to furniſh the quantity, ſince it frequently happens that men who are unable to pay one thouſand *dirms* are capable of furniſhing an equivalent, or even *more* than an equivalent, in barley or wheat. This rule alſo holds regarding every other article ſold by weight or meaſure, or which differs ſo little in its ſpecies that it may be ſold by *number*, (ſuch as *eggs* or *walnuts*,) in the ſame manner as with reſpect to barley or wheat. It is otherwiſe with reſpect to *goods* or *effects*; for if the *Shafee*, hearing that the houſe is ſold for one thouſand *dirms*, reſign his right, and afterwards learn that it was ſold for *goods* equal in value to one thouſand *dirms*, or more, his reſignation is nevertheleſs binding, and he is not entitled to his *Shaffa*, becauſe he would in this caſe be liable for the *price* of the goods, which conſiſts of *dirms* and *deenars*.—So likewiſe, his reſignation is binding if he afterwards learn that the houſe was ſold for a certain number of *deenars* equivalent to one thouſand *dirms*, or more.

or the *purchaſer*;

IF the *Shafee* be firſt informed that a particular perſon is the purchaſer, and thereupon reſign his *Shaffa*, and he afterwards learn that the purchaſer was another perſon, he is ſtill entitled to his *Shaffa*, becauſe a man might not wiſh to have *one* perſon for his neighbour, although he may very readily chuſe to have *another*. In the ſame manner alſo, if he afterwards learn that *two* perſons are the purchaſers,

chaſers, (viz. the one whoſe name he firſt heard of, and another,) he is entitled to take his *Shaffa* from the one in whoſe favour he had not reſigned it.

or where he has been miſinformed concerning the article ſold.

If news be brought to the *Shafee* that one *half* of the houſe is ſold, and he reſign his right, and it afterwards appear that the *whole* was ſold, he muſt ſtill in ſuch caſe claim his *Shaffa*, ſince it is to be ſuppoſed that he at firſt reſigned his right in order to avoid the inconvenience of a partner, whereas if the whole be ſold there is no occaſion for his being ſubject to any ſuch inconvenience. If, on the contrary, the caſe be reverſed, that is to ſay, if he firſt learn that the *whole*, and afterwards that only the *half* is ſold, he is not (according to the *Zâhir Rawâyet*) entitled to claim his *Shaffa*, becauſe his reſignation of the *whole* comprehended his reſignation of *a part*.

SECTION.

Device by which the right of *Shaffa* may be evaded.

Where a man ſells the whole of his houſe, excepting only the breadth of one yard extending along the houſe of the *Shafee*, he [the *Shafee*] is not in this caſe entitled to claim his privilege, becauſe of his neighbourhood being thus cut off. This is a device by which the *Shafee* may be diſappointed of his right; and it is ſtill the ſame, if the ſeller grant the intervening part of his houſe as a free gift to the purchaſer, and put him in poſſeſſion of it.

Caſe of a houſe purchaſed in

If a man purchaſe, firſt, a *ſhare* of a houſe, ſuch as a third or a fourth, and afterwards the remainder,—the neighbour has the privilege of ſhares, by the ſame perſon, at different times.

of *Shaffa* over that ſhare which was *firſt* bought, but not over that which was *laſt* bought; for although, as being a neighbour, he is entitled to that privilege over both, ſtill the purchaſer has a ſuperior right to the *Shaffa* of the *remainder* of the houſe, as being a *partner* therein, the right of a *partner* ſuperſeding that of a neighbour, as has been already explained. If, therefore, a man wiſh to diſappoint a neighbour of his right of *Shaffa*, he may do it by firſt purchaſing a part of the houſe, for the price he means to give for the whole, excepting only a ſingle *dirm*, which he may afterwards give as the price of the remainder.

Where the price of the property ſold is compromiſed for a ſpecific article, the *Shafee*, if he inſiſt on his right, muſt pay the price.

IF a man purchaſe a houſe for a certain price, and afterwards, in lieu of that price, give a *Jamma*, or *gown*, to the ſeller, the *Shafee* muſt take the houſe for the *price firſt ſettled*, and not for the value of the gown; for the exchanging of the price for the gown was a diſtinct and ſeparate bargain; and the price which the *Shafee* is to pay is on account of the *houſe*, not on account of the *gown*. The compiler of the *Hedâya* remarks that this alſo is a device, by which the right of *Shaffa*, either in a partner or a neighbour, may be eluded; as the houſe may be ſold for a price equal to twice its value, and then, in lieu of that price, a gown may be given to the ſeller equal to the real value of the houſe. Such an evaſion, however, may be productive of loſs to the ſeller in caſe the houſe ſhould afterwards prove to have been the right of another; for then the purchaſer of the houſe is entitled to receive back, from the purchaſer of the gown, (that is, the ſeller of the houſe) the *whole price* of the houſe, which was much more than adequate to its value, the bargain regarding the gown remaining undiſſolved. There is, indeed, one mode by which the ſeller may avoid the riſk of ſuch a loſs; and that is, by purchaſing, in lieu of the number of *dirms* for which the houſe was ſold, a quantity of *deenars*;—for, as this is a *Sirf* ſale, it follows that, upon the right of another appearing to the houſe, the agreement becomes null, as mutual ſeizin, which is a condition of *Sirf* ſale, does not here

Digitized by Google

exiſt; becauſe as it here appears that the ſeller was not entitled to the price of the houſe in lieu of which he purchaſed or accepted *deenars*, he is obliged to reſtore the *deenars*, but nothing more.

A DEVICE, as above deſcribed, for eluding the privilege of *Shaffa*, is not abominated by *Aboo Yooſaf*. According to *Mohammed*, however, it is abominable; becauſe (as he argues) the privilege of *Shaffa* is inſtituted ſolely with a view to prevent the inconvenience which might otherwiſe enſue to the *Shafee*; but if devices are admitted to elude and ſet at nought his privilege, the inconveniences which may enſue will not be prevented, and the end of the inſtitution will be defeated. The argument of *Aboo Yooſaf* is, that as the above devices prevent the right of *Shaffa* from ever being eſtabliſhed, the inconveniences that may accrue to the *Shafee* ought not to be conſidered.

SECTION.

MISCELLANEOUS CASES.

The *Shafee* may take a ſhare from one of ſeveral *purchaſers*; but if there be ſeveral *ſellers*, and only one *purchaſer*, he muſt take or relinquiſh the *whole*.

IF five perſons purchaſe a houſe from one man, the *Shafee* may take the proportion of any one of them. If, on the contrary, one man purchaſe a houſe from five perſons, the *Shafee* may either take or relinquiſh the whole, but is not entitled to take any particular ſhare or proportion. The difference between theſe two caſes is that if, in the latter inſtance, the *Shafee* were allowed to claim a part, it would occaſion a diſcrimination in the bargain to the purchaſer, and be productive of very great inconvenience to him; whereas, in the former inſtance, the *Shafee* being merely the ſubſtitute of one of the five purchaſers, no diſcrimination in the bargain is occaſioned. There is no difference in the law in either of theſe caſes, whether, in making the purchaſe, a certain proportion of the price had been ſet againſt each proportion of the houſe,—or whether one price had been in general terms agreed upon for the whole; for the law is grounded only upon the diſcrimination in the bargain. Neither is there any difference whether the *Shafee* take his right before the purchaſer has obtained poſſeſſion, or delay it until after.—This is approved. It muſt, however, be obſerved, that if one of the purchaſers have not obtained poſſeſſion, although he have paid his proportion of the price, the *Shafee* is not entitled to take his ſhare of the houſe until the reſt of the purchaſers have alſo paid their reſpective proportions of the price; for otherwiſe, a part of the houſe being in the poſſeſſion of the *Shafee*, and a part ſtill remaining in that of the ſeller, it is to be apprehended that the ſeller might ſuffer vexation from having a bad neighbour. In ſhort, the *Shafee* here ſtands in the room of one of the purchaſers; and *one* of the purchaſers, on paying his proportion of the price, may not take poſſeſſion of his ſhare until the reſt [of the purchaſers] have alſo paid their proportion. It is otherwiſe *after* poſſeſſion; for in that caſe the *Shafee* may aſſert his privilege, as the poſſeſſion of the ſeller is then deſtroyed.

In caſe of the ſale and partition of *half* a houſe, the *Shafee* may take the purchaſer's lot.

If a man purchaſe one half of a houſe, and afterwards the ſeller and purchaſer make the partition betwixt themſelves, the *Shafee* may either take or relinquiſh that half which fell to the lot of the purchaſer, on which ever ſide it happens to be ſituated: but he cannot object to the partition, and inſiſt upon a new one; for a *Shafee* is not entitled to diſturb the poſſeſſion of the *ſeller*; and as partition is an act of inveſtiture, he is therefore not entitled to diſturb the *partition* alſo. This is related as the opinion of *Aboo Yooſaf*. It is recorded from *Haneefa*, that the *Shafee* is not authorized to take the half in queſtion, unleſs it happen to be on that ſide next to the houſe from which he derives his right; for if the purchaſer's lot fall in the other part of the houſe, he [the *Shafee*] is not the *neighbour*.

If one partner ſell his ſhare, the *Shafee* may annul any ſubſequent partition, and take it for the price.

If one of two partners in a houſe ſell his ſhare, and afterwards the purchaſer and the remaining partner make the partition together, the *Shafee* may object to ſuch partition, and inſiſt upon a new one; becauſe, as no ſale took place betwixt the purchaſer and the remaining partner, this partition is not, ſtrictly ſpeaking, an *act of inveſtiture*, but merely an exerciſe of right of property; and conſequently, the *Shafee* is entitled to annul it, in the ſame manner as he may annul any other act of property, done by the purchaſer, ſuch as *ſale*, or *gift*.

A licenced ſlave (involved in debt) and his maſter may be *Shafee* to each other's property.

If a man, being poſſeſſed of a *Mazoon* [licenced] ſlave, involved in debt, ſell his houſe, that ſlave may be the *Shafee* of it. And in the ſame manner alſo, if ſuch a ſlave ſell a houſe, his maſter may be the *Shafee* of it; for the act of taking a property by privilege of *Shaffa* ſtands as a *purchaſe*; and purchaſe and ſale is admitted betwixt them, as being attended with advantage, ſince it is here conſidered to be on behalf of the creditors. It is otherwiſe where the ſlave is not involved in debt; for then, if he ſell a houſe, it is on account of his maſter; and the man on whoſe account the houſe is ſold cannot be the *Shafee*.

Acts of a father or guardian with reſpect to the *Shaffa* of an infant ward.

If a father or guardian reſign the right of *Shaffa* belonging to their infant ward, ſuch reſignation is lawful, according to *Aboo Yooſaf* and *Haneefa*. *Mohammed* and *Ziffer* ſay that it is not lawful; and that, the right of the infant *Shafee* being ſtill extant, he is entitled to claim it as ſoon as he attains maturity. The learned in the law obſerve that there is the ſame difference of opinion in the caſe of a father or guardian *omitting* to make the claim of *Shaffa* on being appriſed of the ſale of the houſe;—or of an agent reſigning the claim before the tribunal of the *Kâzee*. The arguments uſed by *Mohammed* and *Ziffer* are twofold.—First, it is alleged that, the right of *Shaffa* being firmly eſtabliſhed in the infant, the father or guardian have not the power of annulling it, any more than of annulling his right to a fine of blood or retaliation.—Secondly, their authority over the affairs of the infant is veſted in them in order that they may prevent him from ſuffering

Digitized by Google

any injury; and if they were to annul his right of *Shaffa*, they would *occaſion* an injury inſtead of *preventing* one. The arguments, on the other hand, in ſupport of the doctrine of *Aboo Yooſaf* and *Haneefa* are likewiſe twofold.—FIRST, the taking by privilege of *Shaffa* is virtually traffic, ſince it ſtands as *purchaſe*; and the father or guardian may therefore reject it, in the ſame manner as a thing offered for ſale.—SECONDLY, the taking by privilege of *Shaffa* is an act of a doubtful tendency, as it may either be productive of loſs or of gain: the relinquiſhing of it may therefore be ſometimes the moſt for the minor's benefit, inaſmuch as the price of the houſe will ſtill remain his property; and as the power of a father or guardian is granted them with a view to the benefit of the infant, they ought conſequently to have the power of rejection.

THE ſilence of the father or guardian, or their omitting to claim the *Shaffa*, being conſidered as a *rejection*, annuls the right. It is to be obſerved that the difference of opinion above mentioned obtains only in caſes where the houſe in the neighbourhood of the infant is ſold for a price nearly adequate to its value: but that where the houſe is ſold for *more* than its value, beyond what appraiſers would rate it at, and which it would be moſt adviſeable to avoid, ſome ſay that the reſignation of the father and guardian is admitted to be lawful by all authorities, as being purely *advantageous*; whilſt others, on the contrary, maintain that, according to all, it is not lawful; for as the father and guardian are not empowered, in ſuch a caſe, to take the *Shaffa*, ſo alſo they are not empowered to *reject* it, but are as *ſtrangers*; and the right of the infant ſtill continues to exiſt.

IF a houſe in the neighbourhood of an infant be ſold for a price much inferior to its value, it is recorded as an opinion of *Haneefa* that in ſuch caſe the reſignation of a father or guardian is invalid.

END OF THE THIRD VOLUME.

Digitized by Google

Digitized by Google

ERRATA in the THIRD VOLUME.

Page 12, (in the note,) *for* re-emption, *r.* pre-emption.
13, line 6, *for* " in caſe of the *Sirf*," *r.* " in the caſe of *Sirf*."
33, —— 26, — mean, *r.* means.
36, —— 12, — *de nove*, r. *de novo*.
63, —— 6, — *Takhâlif*, r. *Tahâlif*.
70, —— 21, — every, *r.* any.
133, —— 30, — has, *r.* his.
178, —— 25 and 28, for *Shafa*, r. *Shaffa*.
183, —— 15 to 29, for *Shafa*, r. *Shaffa*.
433, —— 18, *for* " ſo likewiſe," *r.* " *and* ſo likewiſe "
468, (title,) — *Hijhr*, r. *Hijr*.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google